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SUPREME COURT OF THE UNITED STATES

October Term, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This is an important constitutional case that was started over twelve years ago, by a group of students and representative leaders in student government at a state university, to vindicate their first amendment rights. The case was decided by this Court almost six years ago in June, 1989, when the Court ruled in substantial part in the students' favor, finding that the challenged regulation infringed on the students' pure free speech rights. The Court remanded the case to the court below to resolve the commercial speech issues under a modified standard of first amendment analysis.

Due to incredible delays, all plaintiffs had graduated or withdrawn from the defendant university by the time the case came back to the District Court on remand. The District Court originally permitted plaintiffs to amend the complaint to add new parties, but then some 22 months later reversed its order and dismissed the case as moot under Article III for lack of a case or controversy. The Second Circuit Court of Appeals affirmed.

The **Question Presented for Review** is whether the mootness doctrine:

- is a rigid and inflexible jurisdictional bar in every case, regardless of circumstances, based solely on the "case or controversy" provision of Article III of the U.S. Constitution, as held by the court below; or whether it
- has sufficient flexibility to permit a case challenged for mootness to remain under federal jurisdiction to final judgment, for example, by permitting an amendment of the complaint to substitute new plaintiffs, as this Court and other courts have ruled; and
- avoid premature termination of a case, that could deny plaintiffs their opportunity, not only to fully prevail on the merits, but also, as the prevailing parties, to recover their legal fees; — thereby putting at risk congressional intent encouraging private litigation to preserve individual constitutional rights.

LIST OF PARTIES

Plaintiffs are Todd Fox, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan, Jaclyn Bernstein, Glen Magpantay, William Weitz, Corey Anthony, Diego Munoz, Edward Fagan, Baycan Fideli, Jodie Green and Jeffrey Luks.

Defendants are The Board of Trustees of the State University of New York, and Clifton R. Wharton, Jr., individually and as Chancellor of the Board of Trustees, and the State University of New York College at Cortland, and James M. Clark, individually and as President of the College at Cortland, and the State University of New York at Binghamton, and Clifford D. Clark, individually and as President of the State University of New York at Binghamton, and the State University of New York at Albany, and Vincent O'Leary, individually and as President of the State University of New York at Albany, and the State University of New York College of Arts and Sciences at Potsdam, and Humphrey Tomkin, individually and as President of the College of Arts and Sciences at Potsdam.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Second Circuit in this proceeding on February 3, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit of December 9, 1994 is reported at 42 F.3d 135 (2d Cir. 1994), and reprinted in the Appendix ("App.") to this Petition at 6a. The February 3, 1995 Order of the Second Circuit denying plaintiffs' petition for rehearing or rehearing en banc is reprinted at App. 4a.

The Second Circuit's opinion affirmed the May 7, 1993 Order and Opinion of the United States District Court for the Northern District of New York, which is reported at 148 F.R.D. 474 (N.D.N.Y. 1993), and reprinted at App. 23a. That decision reversed the District Court's own prior May 24, 1991 decision, which is reported at 764 F. Supp. 747 (N.D.N.Y. 1991), and reprinted at App. 54a.

This Court's decision of June 29, 1989, with specific instructions on remand to the Second Circuit is reported at 492 U.S. 469 (1989), and reprinted at App. 76a. The Second Circuit's September 26, 1989 Order remanding the case to the District Court is reprinted at App. 96a.

The District Court's decision of June 3, 1983, granting preliminary injunctive relief is reported at 565 F. Supp. 754 (N.D.N.Y. 1983). The District Court's decision of June 12, 1986, following trial is reported at 649 F. Supp. 1393 (N.D.N.Y. 1986). That decision was reversed by the Second Circuit Court of Appeals on March 11, 1989, in a decision reported at 841 F.2d 1207 (2d Cir. 1988).

The District Court's original decision of October 3, 1988, on remand from the Second Circuit, is reported at 695 F. Supp. 1409 (N.D.N.Y. 1988).

STATEMENT OF JURISDICTION

The final judgment of the Court of Appeals for the Second Circuit was entered on February 3, 1995. On February 3, 1995, plaintiffs' request for rehearing or rehearing en banc was denied. *See* App. at 4a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are U.S. Const. Art. III, § 2; Fed.R.Civ. P. 1; Fed.R.Civ. P. 15 and Fed.R.Civ. P. 21. The pertinent text of these provisions is included in the Appendix at App. 98a-99a.

STATEMENT OF THE CASE

This action involves the constitutionality of a regulation, which was enacted by the Board of Trustees of the State University of New York (SUNY), and which prohibits students and their guests from meeting and hearing commercial presentations by business invitees and non-commercial presentations by professional invitees, such as lawyers, doctors or tutors. The regulation applies across all SUNY campuses, including in the students' rented dormitory rooms.

This case was previously before this Court in 1989, when the Court held that both commercial and pure free speech rights were at issue and remanded to the Court of Appeals to decide whether the regulation passed muster under the standards announced in that opinion. 492 U.S. 469, 486 (1989), App. at 92a. Incredibly, these issues have never been resolved and the past six years have been spent litigating the issue of mootness.[1]

1982 — The Original Action

The case began more than twelve years ago in December, 1982. On December 3, 1983, the District Court preliminarily enjoined the SUNY regulation on the ground that it infringed on the students' commercial speech rights. 565 F. Supp. 757, 771 (N.D.N.Y. 1983). The District Court concluded that although SUNY may have legitimate purposes for the policy, it was apparently premised on "undifferentiated fear or apprehension." *Id.* at 765. Thus, there was no evidence that the "blanket prohibition" directly advanced those purposes or

1. A timeline of the procedural history of this case detailing the extraordinary delays over the last thirteen years is attached at App. 1a.

that the purposes could not be served as well by less restrictive restraints on speech. 565 F. Supp. 754.

Following a non-jury trial on the merits, the District Court on December 12, 1986, dissolved its preliminary injunction and sustained the SUNY policy. 649 F. Supp. 1393. (N.D.N.Y. 1986). Although the District Court found that there was evidence of less restrictive measures that would further the intended purposes of the ban, the Court concluded that the regulation affected only commercial speech and was thus sustainable under the rational basis analysis. *Id.* at 1401-02.

1986-1988 — Appeal to the Second Circuit

On appeal, the Second Circuit reversed and remanded, ruling that the "SUNY Regulation survived constitutional scrutiny below only because the First Amendment rights of students were ignored." 841 F.2d 1207, 1214 (2d Cir. 1988). The Court rejected the rational basis analysis applied by the District Court in favor of a "least restrictive means" test. *Id.*

1988 — First Remand to the District Court

On October 3, 1988, the District Court on remand struck down the SUNY regulation as a violation of the students' commercial speech rights. 695 F. Supp. 1409, 1413 (N.D.N.Y. 1988). The District Court found that the regulation did not directly advance the state's interests and that the regulation was more extensive than necessary. *Id.* at 1414.

1989 — Decision and Remand Order by this Court

A writ of certiorari, sought by SUNY, was granted by this Court on the same day that the District Court issued its opinion striking down the regulation. Following receipt of briefs and oral argument on February 22, 1989, this Court issued its decision on June 29, 1989. Justice Scalia writing for the majority held that Resolution 66-156 not only prohibits commercial speech, but also pure non-commercial speech, which is entitled to the fullest protection of the First Amendment. 492 U.S. at 481-82, App. 88a-89a. The Court declined to enter judgment for the plaintiffs on this issue because they had not filed a

cross-petition for certiorari. It remanded the case to the Second Circuit for determination of:

- the validity of the application of the regulation to pure non-commercial speech;
- whether the regulation was narrowly tailored in its application to commercial speech; and
- whether Resolution 66-156 may be constitutionally infirm due to "its substantial overbreadth."

492 U.S. at 486, App. at 92a.

Justice Blackmun, in a dissenting opinion, readily found the resolution to be substantially overbroad and stated it should be struck down immediately "in order to avoid chilling protected speech during the pendency of proceedings on remand." 492 U.S. at 488-89, App. at 94a-95a (Blackmun, J., dissenting).

1989-1993 — Remand to the District Court and Dismissal for Mootness

On June 26, 1989, the Second Circuit rejected plaintiffs' application for that court to decide the open issues, and remanded this case to the District Court, explicitly quoting the remand instructions in the Supreme Court opinion. App. at 97a.

On May 24, 1991, nearly two years after the case was remanded from this Court, the District Court ruled the case was moot because the plaintiffs were no longer SUNY students. 764 F. Supp. 747, 757 (N.D.N.Y. 1991), App. at 71a. However, the Court granted plaintiffs leave to amend their Complaint to add current SUNY students as plaintiffs, recognizing that granting plaintiffs leave to amend would cause no prejudice to defendants and would advance the resolution of this case on the merits.[2] 764 F. Supp. at 758, App. at 73a-74a. Plaintiffs in turn filed an amended complaint naming current SUNY students as plaintiffs.

2. *See* Fed. R. Civ. P., 1, 15(a), and 21, reprinted in App. at 98a-99a.

On May 7, 1993 **(nearly four years after the remand order)**, the District Court issued an opinion which reversed its prior opinion that had permitted plaintiffs to amend their Complaint to add new plaintiffs. The District Court dismissed the case as moot because of the absence of a "case or controversy" under Article III of the Constitution. 148 F.R.D. 474, 489 (N.D.N.Y. 1993), App. at 53a. The court ruled that it had "no leeway" to permit an amended complaint, suggesting that plaintiffs should have brought a class action lawsuit or should now institute a new action. 148 F.R.D. at 483-84, App. at 41a-42a.

1994-1995 — Appeal to the Second Circuit: Dismissal Affirmed and Petition for Rehearing Denied

Plaintiffs appealed the order and decision of the District Court to the Second Circuit Court of Appeals, which affirmed the District Court's ruling. 42 F.3d 135 (2d Cir. 1994), App. at 6a. The Court of Appeals ruled that the mootness doctrine was based on the case or controversy requirement of Article III of the Constitution and, as a result, the Court applied the doctrine rigidly. Although several plaintiffs filed affidavits indicating that they wished to re-enroll at SUNY to complete their education or to obtain graduate degrees, the Court of Appeals held that the case was not "capable of repetition, yet evading review". 42 F.3d at 143, App. at 21a-22a. The Court agreed with the District Court that it did not have the power to allow plaintiffs to amend their complaint to join additional students as plaintiffs once the case became moot. 42 F.3d at 144, App. at 22a. On February 3, 1995, without opinion, the Court denied Plaintiffs' Petition for Reargument. App. at 4a.

In its opinion, the Court rejected plaintiffs' argument, based on the cases discussed below, that the mootness doctrine is

- "prudential and flexible, not rigid;" and that
- "there are strong reasons to override the mootness doctrine where a case, rooted in federal jurisdiction, is accepted by the U.S. Supreme Court."[3]

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3. *See* Outline of Oral Argument, Points #1 and 9, App. at 3a. This

REASONS FOR GRANTING THE WRIT

1. This Court Should Grant Certiorari to Resolve Persistent Conflicts Among the Lower Courts Over the Application of the Mootness Doctrine.

This Court should once and for all clear up the disagreement in this Court, and conflicts below, regarding the basis for and the application of the mootness doctrine. Because of the current state of confusion regarding the mootness doctrine, its application can as demonstrated by this case:

- *Constitute* an incredible waste of judicial resources and squander the valuable expertise and time of dedicated judges, particularly the members of this Court, where, as here, following briefs and oral argument, the Court handed down a major decision and remanded for further review which has not yet taken place.
- *Reward* defendants for delaying and prolonging litigation rather than changing their unconstitutional conduct. In this case, SUNY, the party which sought certiorari did not raise the mootness claim until **after** it had lost its principal issue on appeal, when it had notice of the facts supporting its mootness argument **before** the case was argued before this Court. By this delay, defendants were able to continue to this day their unconstitutional conduct and prevent the plaintiffs from establishing their right to relief and possibly to recover fees for their counsel as prevailing parties.
- *Require* further costly litigation to resolve issues this Court directed be resolved six years ago, which could have been avoided by two simple procedural expedients:
  - ∞ determining the action was not moot because it was brought in a representative capacity; and
  - ∞ permitting an amendment under Fed. R. Civ. P. 15 and 21 to add additional parties.
- Finally, there are adverse judicial consequences, where the mootness doctrine is unfairly applied to parties, who are not responsible for the long delays as in this case.

---

outline was presented to the panel and opposing counsel at the time of oral argument and all points #1-9 were stressed by plaintiffs' counsel throughout the argument.

It can further undermine an already waning public confidence in the judicial system's will and ability to decide important public issues promptly and efficiently. This is particularly so with regard to the student plaintiffs in this case, as representative leaders in student government, in their first exposure to the U.S. legal system, and the over 1,500,000 students from colleges and universities throughout the country, on whose behalf amicus briefs were filed in 1989 in this Court.[4]

Furthermore, permitting a defendant to prematurely terminate an action by asserting a mootness defense, may preclude plaintiffs from seeking recovery of legal fees as the prevailing party. This will have a "chilling effect" on the willingness of the private bar to make legal services available to such students, particularly where, as here, there is no claim asserted for monetary damages.[5]

2. The Confusion and Conflicts in the Application of the Mootness Doctrine Are Revealed by Numerous Cases, Learned Commentaries, and Recent Statements by the Justices of this Court.

A. *The confusion has been commented on by the Second and Sixth Circuits.*

This case raises a critical, debated and unresolved issue regarding the doctrine of mootness. Hundreds of cases are decided by the federal courts each year involving the doctrine of mootness and a wide array of constitutional issues. Because the precise contours of the doctrine remain in dispute, however, it has been applied in an inconsistent and totally unpredictable manner by the courts.

Both the Second and Sixth Circuit Courts of Appeals have recently observed that the basis for and application of the mootness doctrine are much in dispute:

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4. *See* Amicus brief filed in this action in this Court on December 20, 1988, on behalf of Student Association of the State University of New York, Inc.; Arizona Students' Association; California State Student Association; Colorado Student Association; Connecticut Student Association; Michigan Collegiate Coalition, Inc.; Oregon Student Lobby; Rutgers College Governing Association; Rutgers University Legislative Affairs Council; and United Council of University of Wisconsin Student Government, Inc.

5. See further discussion below at Section 3.D., pp. 27-29.

• Former Chief Judge Oakes of the Second Circuit has stated that "[r]ecently, members of the Supreme Court and commentators have questioned the nexus between the mootness doctrine and Article III." *Heldman v. Sobol*, 962 F.2d 148, 154 n. 7 (2d Cir. 1992).

• The Sixth Circuit raised similar questions regarding the mootness doctrine even more recently, noting that "considerable controversy surrounds the mootness doctrine" after this Court's decision in *Honig v. Doe,* 484 U.S. 305 (1988). *Kellogg v. Shoemaker,* 46 F.3d 503, 507 (6th Cir. 1995). There the Court of Appeals summarized the competing views of mootness:

- ***Article III Based:*** One view holds that the mootness doctrine "is **fundamentally tied to the case and controversy language of Article III,** and, therefore, the court may only review if there is a justiciable issue." *Id.* (emphasis added).
- ***Prudential Doctrine:*** Another view is that the mootness doctrine "**is more flexible, and may be used to accomplish prudential concerns to avoid the squandering of judicial resources after the decisional process is underway**." *Id.* (emphasis added).

B. *The confusion has been the subject of many legal commentaries.*

Legal commentaries have also noted the ongoing debate in the courts regarding the doctrine of mootness:

• One commentator has stated that "mootness law is both internally inconsistent and, more often, difficult to square with other aspects of federal justiciability law." Gene R. Nichol, Jr., *Moot Cases, Chief Justice Rehnquist, and the Supreme Court,* 22 Conn. L. Rev. 703, 708 (1990). According to Dean Nichol, "[t]rying to square a constitutional aversion to moot cases with the reality that at least several members of the Supreme Court have likely meant to reach the merits of the substantive dispute, or else they would not have accepted the case for review, has caused eminent jurists — with some frequency — to say very silly and indefensible things . . . Institutionally, it can do the Court little good for such arguments to find their way into published opinions." *Id.* at 708-10.

• Another commentator has described the court's treatment of mootness as "unprincipled and chaotic." Corey C. Watson, Comment, *Mootness and the Constitution,* 86 Nw. U. L. Rev. 143, 145 (1991). According to this author, the core of the dispute is the constitutional question: "Is mootness rooted to article III of the Constitution, or is it a prudential doctrine, a product of judicial policy?" *Id.* at 146.

• Yet another commentator has stated that the Supreme Court has come close to "reexamining the supposed constitutional underpinnings of justiciability" in mootness cases and "hinted that it might be willing to make incursions into the orthodox view that Article III lies at the core of justiciability." Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness,* 105 Harv. L. Rev. 605, 609 (1992). Professor Lee has argued that "imparting constitutional status on the justiciability doctrines is inconsistent with the venerable principle that the federal courts should reserve for Congress a significant role in overseeing the contours of their jurisdiction." *Id.* at 609. Professor Lee has further noted that the text, history and structure of Article III do not support the position that the mootness doctrine is constitutionally based. *Id.* at 608-09, 636-43.

• Professors Wright, Miller and Cooper in their treatise on Federal Practice and Procedure have also noted the confusion in the courts regarding the doctrine of mootness. They have written that resort to Article III language does not resolve the confusion:

> Despite the clear separation in received theory between mootness principles mandated by Article III, and principles merely of remedy or judicial administration, most decisions do not undertake any explanation of the sources drawn upon. . . .
>
> The core of both Article III and remedial doctrines, in short, is a search for the possibility that granting a present determination of the issues offered, and perhaps the entry of more specific orders, will have some effect in the real world. Resort to Article III language does not

> advance the search, and there is little prospect that clear lines will be drawn between constitutional and prudential doctrines.

13A Charles A. Wright, et al., *Federal Practice and Procedure,* § 3533.1, at 225-26 (1984 & Supp. 1994) (footnotes omitted).

C. *The confusion has been recognized in Opinions of this Court.*

The basis for and application of the mootness doctrine has also been recently debated by members of this Court. Chief Justice Rehnquist has observed that if Article III is truly the basis for mootness, there can be no exceptions to the doctrine because Article III has no exceptions. *Honig v. Doe,* 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring). The Chief Justice explained in *Honig* that:

> If it were indeed Art. III which — by reason of its requirement of a case or controversy for the exercise of federal judicial power — underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review." **If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are "moot"** but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions.

Id. (Rehnquist, C.J., concurring) (emphasis added). The Chief Justice went on to state: "The logical conclusion to be drawn from these [mootness] cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, **it is an attenuated connection that may be overridden where there are strong reasons to override it.**" *Id.* at 331 (Rehnquist, C.J., concurring) (emphasis added).

The decision in *Honig* dramatically illustrates the difficulty a court faces when dealing with a mootness issue and the perceived connection to Article III. The plaintiff in *Honig* alleged that he was denied educational services to which he was entitled under the Education of the Handicapped Act. By the time the case worked its way to this Court, the plaintiff had dropped out of school. Obviously, tremendous resources had been expended in litigating the case and the Court deemed the issues involved worthy of certiorari.

Accordingly, although there was no affirmative showing that the plaintiff would re-enter the state school system, the Court ruled that the case was not moot because there was a "reasonable expectation" that he would seek to complete his education. *Id.* at 318 n.6.

Justice Brennan, writing for the majority of the Court, held that the courts will maintain jurisdiction where there is a reasonable (not probable) likelihood that the litigant will again be wronged in a similar way and that any resulting claim will otherwise evade review. *Id.* at 319-320. The majority explained that the concern in such cases is whether the controversy is "*capable* of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Id.* at 319 n.6.

Justice Scalia and Justice O'Connor dissented from the majority's opinion in *Honig*. Their opinion cautioned that the majority's opinion was "fraught with potential for future mischief," and that the majority's interpretation of a "reasonable expectation" had been "deprived of all meaning," for the Court was free to "give it whatever application it wishes without fear of effective contradiction." *Id.* at 333, 337 (Scalia and O'Connor, J.J., dissenting). The dissent argued that the "capable of repetition" exception was limited to exceptional cases in which there is a *demonstrated probability* that the litigant will suffer the same problem that created the litigation. *Id.* at 333 (Scalia and O'Connor, J.J., dissenting).

Chief Justice Rehnquist took issue with both the majority and the dissent. In his concurring opinion, he concluded that mootness "may be overridden where there are strong reasons to override it." *Id.* at 331 (Rehnquist, C.J., concurring). For

example, where a case became moot after a grant of certiorari, the Chief Justice argued that the doctrine of mootness should be abandoned altogether or relaxed. The Chief Justice stressed the unique resources squandered in such cases and the responsibility of the Supreme Court to decide the law of the land as it affects *all* the people, not just the litigants. *Id.* at 332 (Rehnquist, C.J., concurring).

D. *The mootness doctrine as historically applied by this Court is flexible and "riddled with exceptions."*

Even the most cursory review of this Court's decisions regarding mootness confirms Chief Justice Rehnquist's view that the connection between mootness and Article III is an attenuated one that may be overridden where there are strong reasons to do so.

The Supreme Court's first mention of Article III in connection with mootness did not come until a 1964 case, *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964), which the Court found not to be moot at all. *See* Lee, *Deconstitutionalizing Mootness,* 105 Harv. L. Rev. at 611. As support for the Article III linkage, the Court cited two law review articles. "One of these articles was quite equivocal about the Article III linkage, and the other was content to rely entirely on the proposition that a moot case is neither a case nor a controversy in the constitutional sense — a claim that is far from self-evident." *Id.* at 612.

Seven years later in *Roe v. Wade*, 410 U.S. 113 (1973), the Court again dealt with the issue of mootness. The plaintiff in *Roe* was pregnant when she began her suit in 1970 and that pregnancy obviously had ended by the time the Supreme Court rendered its decision in 1973. Responding to the argument that the case was moot, Justice Blackmun's majority opinion explained that if the termination of the pregnancy deprived the Court of jurisdiction, there could never be an appellate review of decisions on abortion laws. *Id.* at 125. The majority opinion did not explain, however, how the plaintiff retained a personal stake in the outcome of the case so as to satisfy Article III. Once her pregnancy ended, the plaintiff in *Roe* had no more personal stake in the outcome of the case

than any other child-bearing woman in the jurisdiction. Nevertheless, the case was found not to be moot. *Id.*

In *United States Parole Commission v. Geraghty,* 445 U.S. 388 (1980), this Court continued to debate the relationship between mootness and the "case or controversy" requirement of Article III. There it held that an action brought on behalf of a class does not become moot on the expiration of the named plaintiff's substantive claim. *Id.* at 404. Justice Blackmun, writing for the majority, explained that the mootness doctrine had a "flexible character." *Id.* at 400. "Art. III justiciability is 'not a legal concept with a fixed content or susceptible of scientific verification,'" but " 'one of uncertain and shifting contours.' " *Id.* at 400-01 (citations omitted).

The Court stated that it was rejecting a "strict, formalistic view of Art. III," noting that **the mootness doctrine is "riddled with exceptions . . . and in creating each exception, the Court has looked to practicalities and prudential considerations."** *Id.* at 404-06 & n. 11 (emphasis added). "The resulting doctrine can be characterized, aptly, as 'flexible'." *Id.*

Roe and *Geraghty* are not unusual opinions in this respect. As demonstrated below, on at least *seventeen other occasions*, this Court has held that when significant constitutional issues are at stake, the mootness doctrine is flexible. The Court has found a wide range of possible issues capable of repetition. Not one of these important constitutional decisions would have been rendered were Article III an absolute bar.

CASE	ISSUE FOUND TO BE CAPABLE OF REPETITION
Norman v. Reed, 502 U.S. 279, 287-88 (1992)	Unsuccessful candidate may again run for election and be denied the right to use party name on ballot
International Org. of Masters v. Brown, 498 U.S. 466, 473 (1991)	Unsuccessful candidate may again run for union office and be denied the right to union's mailing list

CASE	ISSUE FOUND TO BE CAPABLE OF REPETITION
Meyer v. Grant, 486 U.S. 414, 417-18 n.2 (1988)	Proponents of initiative may again wish to pay petition circulators to obtain signatures on initiative petition
Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes, 481 U.S. 429, 436 (1987)	Union may again find itself involved in labor dispute and wish to picket secondary railroads not involved in dispute
Brock v. Roadway Express, Inc., 481 U.S. 252, 257-58 (1987)	Company may again attempt to discharge employee in retaliation for refusing to operate an unsafe vehicle without allowing employee an evidentiary hearing
California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 578 (1987)	Company may again submit mining plans for national forest that would trigger contested permit requirement
Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 6 (1986)	Newspaper may again seek access to and be denied access to transcript of preliminary hearing
Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 285 n.3 (1986)	Company may again violate the NLRA three times and be debarred from doing business in the state
Board of Educ. v. Rowley, 458 U.S. 176, 186-87 n.9 (1982)	School district may again enact plan with similar deficiencies
Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602-03 (1982)	Press may again wish to attend and be excluded from rape trial involving a victim under 18
Democratic Party of United States v. Wisconsin, 450 U.S. 107, 115 n.13 (1981)	State may again wish to use prohibited process in choosing delegates for national convention

CASE	ISSUE FOUND TO BE CAPABLE OF REPETITION
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980)	Press may again wish to attend and be prohibited from attending trial
Vitek v. Jones, 445 U.S. 480, 486-87 (1980)	Prison may again attempt to transfer prisoner to mental hospital without evidentiary hearing
Gannett Co. v. DePasquale, 443 U.S. 368, 377-78 (1979)	Press may again wish to attend and be excluded from pretrial hearing
SEC v. Sloan, 436 U.S. 103, 108-10 (1978)	Investor may again hold stock of company subjected to summary suspension order by SEC
First Nat'l Bank v. Bellotti, 435 U.S. 765, 774-75 (1978)	Company may again wish to contribute money in an effort to influence voters
United States v. New York Tel. Co., 434 U.S. 159, 165 n.6 (1977)	Company may again be forced to allow pen register surveillance

It is clear from the above-cited cases and countless others that this Court has treated mootness as a prudential doctrine to enable it to decide cases on appeal whenever a decision on the merits would help give true and concrete meaning to important public values. The exceptions to the mootness doctrine have been created and applied as a means to that end, not as the end itself. As the Third Circuit has stated, the exceptions to the mootness doctrine have been found "so as to satisfy the true governing consideration behind the Court's decision—that of having review available when *significant interests* are at stake." *United States v. Frumento,* 552 F.2d 534, 540 (3d Cir. 1977) (emphasis added).

E. *There are serious and recurring conflicts among the Circuits.*

As this Court has debated the issue of mootness, the lower federal courts have been in a quandary to balance pru-

dential concerns with the rigid "case or controversy" approach. The recognized "exceptions" to the mootness doctrine have been interpreted and applied by the lower courts in conflicting manners to achieve varying ends. In the process, Article III, which is of great significance in other contexts, has been trivialized.[6]

In certain cases, the doctrine has been applied rigidly and inflexibly in order to avoid reaching the merits of the case. One commentator has stated that "mootness is a convenient tool for avoiding 'hard' cases." Henry P. Monaghan, *Constitutional Adjudication: The Who and When,* 82 Yale L.J. 1363, 1384 n. 141 (1973). Another has stated similarly that only "[d]ifficult cases are moot." Currie, *Federal Courts* 89 n.3 (1982). The underlying issues in such cases remain unresolved and, instead of spending time analyzing the merits of the case, the appellate court is left to debate the nuances of the doctrine of mootness.

In other cases, the courts have strained for ways to avoid mootness by relying on a number of inconsistent exceptions to allow the case to proceed to the merits. Professors Wright, Miller and Cooper have stated that courts will *"conjure up"* a possibility or recurrence to accomplish such ends. 13A Charles A. Wright, et al., *Federal Practice and Procedure,* § 3533.1, at 226 (emphasis added). Another commentator has remarked that eminent jurists often "say very silly and indefensible things" to fit an otherwise moot case within an exception. Nichol, *Moot Cases, Chief Justice Rehnquist and the Supreme Court,* 22 Conn. L. Rev. at 703.

The end result is that the doctrine of mootness is applied by the lower courts in an illogical and incoherent manner. Both plaintiffs and defendants are subject to the whim of a particular judge as to whether the mootness challenge will succeed or fail. The appellate process has become bogged down with deciding mootness issues, rather than the underlying constitutional issues involved. Because those underlying issues are not resolved, new litigation ensues. The result is quite simply confusion at worst and inconsistency at best.

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6. Article III is reprinted in App. at 98a.

(1) *There are conflicts regarding the* ***significance of a student plaintiff's graduation*** *from a defendant institution.*

Second Circuit vs. Sixth Circuit

The claims of the students in this case were found by the Second Circuit to be moot because they left the defendant institution while the case was on appeal. This result conflicts with *Washegesic v. Bloomingdale Public Schools,* 33 F.3d 679 (6th Cir. 1994), *petition for cert. filed,* 63 USLW 3644 (Feb 15, 1995), where a student brought an action to compel his high school to remove a portrait of Jesus Christ from being displayed in the hallway of the school. Because the student-plaintiff graduated during the pendency of the appeal, the defendants moved to dismiss the case as moot. The Sixth Circuit concluded that the case was not moot because **"any parent, employee or former student who uses the school facilities and suffers actual injury would have standing to sue."** *Id.* at 683.[7]

The facts of *Washegesic* and the facts of the instant case are indistinguishable. Plaintiffs' Amended Complaint in this case specifically alleges that the challenged regulation infringes upon the plaintiffs' rights to both "host and/or *attend* in the privacy of their own or *another student's dormitory room* a meeting to discuss with a business invitee such topics as the students, in the exercise of their own free choice, decide that they want to participate in." Amended Complaint, ¶28 (emphasis added). The students could return as visitors like the student in *Washegesic* and be subject to the same unconstitutional regulation.

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7. The Sixth Circuit appears to have taken a very liberal approach to the mootness issue. *See, e.g., Pinette v. Capitol Square Review & Advisory Bd.,* 30 F.3d 675 (6th Cir. 1994), *cert. granted,* 115 S. Ct. 787 (1995) (claims brought by KKK not moot even though activity terminated because KKK or some other organization may seek access in the future).

(2) *There are conflicts regarding the* ***plaintiffs' right to amend*** *a complaint to correct an alleged mootness problem.*

Second Circuit vs. Third Circuit

The Second Circuit ruled in this case that mootness prevented plaintiffs from amending their complaint to add new students as plaintiffs. 43 F.3d at 144, App. at 22a.

This conflicts with the Third Circuit's decision in *Bender v. Williamsport Area School District,* 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds,* 475 U.S. 534 (1986), where that Court held that where students who had brought a complaint had since graduated, it was appropriate to allow an amendment to the complaint to substitute new student-plaintiffs. *Id.* at 542 n.4. The Court reasoned that because the significant constitutional issue was capable of repetition and because there was no prejudice to the school district, leave to amend to substitute new student plaintiffs should be granted. *Id.*

(3) *There are conflicts regarding the correct application of the* ***capable of repetition, yet evading review exception*** *to the mootness doctrine.*

Second Circuit vs. Seventh Circuit

The Second Circuit ruled that issues in this case were not capable of repetition although there was evidence that the student plaintiffs contemplated re-enrolling at SUNY to pursue their education. For example, one student had left SUNY only two credits shy of graduation. He filed an affidavit indicating that he "definitely plan[ned]" to return to SUNY to complete his degree. Other students filed affidavits stating that they intended to take graduate courses at SUNY.

Other courts have found similar facts to satisfy the capable of repetition exception. In *Jones v. Illinois Department of Rehabilitation Services,* 689 F.2d 724, 727-28 (7th Cir. 1982), the Seventh Circuit held that a case brought by a deaf college student who graduated before appeal was not moot where

there was a possibility that student could continue or attend graduate school. The Court of Appeals stated that "although [plaintiff] disclaims any current intent to attend graduate school, that is a possibility that cannot be discounted in today's society . . ." *Id.* at 728.[8]

Conflicts within the Second Circuit

Even the same court has entered conflicting decisions on the application of the mootness doctrine in the very factual issue scenario raised in *Honig. Compare Heldman v. Sobol,* 962 F.2d 148, 157 n.9 (2d Cir. 1992) with *Christopher P. v. Marcus,* 915 F.2d 794, 803-04 (2d Cir. 1990), *cert. denied,* 498 U.S. 1123 (1991), where the Second Circuit reached opposite conclusions regarding the mootness of claims brought by handicapped children who were no longer enrolled in the defendant schools.

Conflicts Among Current Justices While Sitting on the Circuit Court of Appeals for the District of Columbia

The disagreement regarding the correct application of the capable of repetition exception is perhaps best illustrated by the debate between two current members of this Court while sitting on the Circuit Court of Appeals for the District of Columbia.

Justice, then Circuit Judge, Ginsburg, wrote the majority opinion in *Doe v. Sullivan,* 938 F.2d 1370 (D.C. Cir. 1991),

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8. *See also Johnston-Loehner v. O'Brien,* 859 F. Supp. 575, 578 (M.D. Fla. 1994) (Suit brought by elementary school student challenging certain school policy on constitutional grounds. After suit was filed student transferred to private school. Court found that there was a reasonable expectation that the student could switch schools again and be subject to the same policy as before); *Carroll v. Blinken,* 768 F. Supp. 1030, 1031 n.1 (S.D.N.Y. 1991), *aff'd in part, rev'd in part on other grounds,* 957 F.2d 991 (2d Cir. 1992), *cert. denied,* 113 S. Ct. 300 (1992) (SUNY students sought to enjoin as unconstitutional certain allocations of a student activity fee. After the trial was concluded, plaintiff was academically dismissed from SUNY. The court found the case not moot because the student would not be prohibited from re-applying to SUNY at a later date and being re-admitted, at which time the student would face the same allocation of a student activity fee).

where a serviceman brought an action challenging an FDA interim regulation permitting the Defense Department to use unapproved drugs on military personnel in the Desert Storm operation. Although the Desert Storm operation was concluded by the time the case reached to the appellate court, the majority held that the case was not moot because it was capable of repetition. The Court, through Circuit Judge Ginsburg, recognized the flexible character of the mootness doctrine and the need to apply the standard prudentially and without excessive stringency. *Id.* at 1379. Acknowledging that the "recurrence prospect here does not qualify as a strong probability", the Court relied on *Honig* to support the application of the exception under these circumstances. *Id.* at 1378 n.13.

Justice, then Circuit Judge, Thomas strongly dissented. He reasoned that the case was moot because there was no showing that the plaintiff may again be involved in a war in which he would face a medical threat that requires the administration of investigational drugs. *Id.* at 1386 (Thomas, J., dissenting).

(4) *There are conflicts regarding the correct application of the* ***representative action exception*** *to the doctrine of mootness.*

Further confusion exists regarding the exception to the doctrine of mootness for representative actions:

• In *Sosna v. Iowa,* 419 U.S. 393, 401 (1975), this Court held that the mootness of a named plaintiff's individual claim after a class had been certified does not render the action moot.

• In *United States Parole Commission v. Geraghty,* 445 U.S. 388, 404 (1980), the Court extended this exception to actions brought on behalf of a class even though the class was never certified.

• In this case, the Court of Appeals ruled that such an exception only applied where the case was initially filed as a class action. 42 F.3d at 142, App. at 19a-20a. This ruling conflicts with other decisions, such as *Brandon v. Board of Education,* 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123

(1981), where the case, which started as a class action but was never so declared, was held not moot despite the students' graduation because the students were acting in a representational capacity for members of the organization *Id.* at 973 n.1.[9]

(5) *This case presents the Court with the opportunity to resolve the conflicts.*

In sum, the Second Circuit's decision in this case not only reveals a sharp and persistent split among the federal circuit courts of appeal on the exceptions to the mootness doctrine, but also creates a split as to whether a party has a right to amend to remedy the mootness. There is no clear and concise standard determining when one case is moot and when another is not. The effect of this situation is that persons who reside in different jurisdictions might see their significant constitutional issues decided on the facts of their case while individuals in other jurisdictions with the same set of facts might not be afforded the same opportunity.

Accordingly, in order to promote a more cohesive, less acrimonious and more consistent circuit court system, this Court should grant the Petition for Writ of Certiorari not solely for the benefit of the parties here, but for the benefit of all litigants who seek guidance from this Court on fundamental constitutional issues such as are presented in this case.

3. This Case Illustrates the Inequities and Waste of Judicial Resources from the Rigid and Inflexible Application of the Mootness Doctrine.

The mootness doctrine was never intended to be used as a sword or a shield to legitimize unconstitutional conduct. The system suffers, the Constitution is tarnished, and litigants and society lose confidence in the ability and independence of the

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9. One commentator has noted that "nothing in the [representational capacity] rationale itself precludes its application to cases involving group interests in which the plaintiff did not file suit on behalf of a class." Note, *The Mootness Doctrine in the Supreme Court,* 88 Harv. L. Rev. 373, 388 (1974); *see also American Party v. White,* 415 U.S. 767, 770 n.1 (1974); *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969).

courts. This applies particularly to the instant case where university students' good faith efforts to vindicate an unconstitutional infringement of their First Amendment rights, have been made a mockery of by the delays in this case, which now drags on into its 13th year.

The case, which was started in 1982, is still undecided, and is now under the cloud of a mootness defense, asserted for the first time by SUNY on remand to the district court, and only after it lost its principal argument on appeal to this Court.

A. *This Court's resources should not be wasted once this Court accepts jurisdiction.*

Once this Court has assumed jurisdiction, this Court's valuable resources should not be wasted and disregarded by the application of the mootness doctrine. This Court should make clear that once it has decided to hear an important case, receive briefs and oral argument, write a definitive opinion, and remand the case to be decided under a modified standard of review, a party should not be permitted to assert a mootness defense, thereby prevailing on the court below to avoid deciding the very issues as remanded by this Court.

This position, based on common sense and judicial economy, has been advocated by Mr. Chief Justice Rehnquist, concurring in *Honig v. Doe.* There, he concluded his concurrence with the following statement:

> I would leave the mootness doctrine as established by our cases in full force and effect when applied to the earlier stages of a lawsuit, but I believe that *once this Court has undertaken a consideration of a case,* an exception to that principle is just as much warranted as where a case is "capable of repetition, yet evading review."

484 U.S. at 332 (Rehnquist, C.J., concurring) (emphasis added).

Chief Justice Rehnquist, in an earlier section of his concurrence, explained the rationale for the rule posited above. Cautioning against "squandering" the "unique resources" of time spent by the Court on briefs, oral argument and conferring, he stated:

> To me the unique and valuable ability of this Court to decide a case — we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts — *is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review,* or at least to relax the doctrine of mootness in such a manner as the dissent accuses the majority of doing here.

Id. (Rehnquist, C.J., concurring) (emphasis added).

B. *A party should not be rewarded for a belated claim of mootness.*

A party who seeks certiorari should not be permitted to prevail on a mootness defense that it asserted only after it lost its principal argument on appeal, particularly when it had notice of the facts supporting its claim of mootness before oral argument in this Court.

It was the defendant university, SUNY, that sought certiorari review and lost: — contending that its right to restrict its students' free speech should be measured by the "rational basis" test under the "public forum analysis." This Court disagreed, ruling that pure speech rights were involved and adopting a more rigorous standard for analysis of restrictions on commercial speech. The Court held that on remand, SUNY had the burden to affirmatively establish that its regulation directly advanced its interests and was no more extensive than necessary. 492 U.S. at 480, App. at 87a.

In other words, as Mr. Justice Scalia wrote for the Court, there must be a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," and the regulation must be "narrowly tailored to achieve its desired objective." *Id.*

Additionally, the record in the court below established that defendant SUNY, was on notice of the facts supporting its mootness claim, (i.e., that by August 1988, all of the student plaintiffs had either graduated or withdrawn) well *before* this case was finally briefed and argued before this Court on February 22, 1989.

However, as the party seeking review in this Court, SUNY did not assert this defense in the District Court until February 5, 1990, some 7 months after this Court came down with its decision and remand order of June 29, 1989, and *after,* as noted above, SUNY had lost the principal issue it had raised on appeal.

Furthermore, SUNY should not be rewarded by being allowed by an assertion of mootness to continue to this day

(i) its unconstitutional conduct infringing on its students' pure free speech rights;[10]

(ii) to prevent the student plaintiffs from establishing their rights to total relief and thereby;

(iii) avoid having to pay plaintiffs, as the prevailing parties, the attorneys' fees incurred.[11]

As noted in section 1 above, such action by a defendant, particularly where as here, no damage claims are brought, could have serious public policy consequences by the "chilling effect" on the private bar's willingness to get involved in difficult constitutional cases. To the contrary, as the Congress has declared in adopting 28 U.S.C. § 1988, one of its principal reasons was to promote the "private attorney general" concept to encourage the private bar to get involved in just these kinds of cases.

C. *Two simple procedural expedients to avoid mootness should have been utilized.*

The mootness issue in this case could easily have been avoided by two simple expedients:

(1) *Representative capacity:* The Court refused to recognize as was vigorously argued below, that the action was brought by responsible leaders in student government as representatives of the student body, that included two elected presidents of student government, one elected vice president and a number of other elected representatives of the student

10. See fn. 15 below, containing colloquy at oral argument where Judge Winter inquired why SUNY had not modified its Regulation, — at least with respect to its **limitations on pure free speech** declared unconstitutional by this Court almost 6 years ago - June 29, 1989.

11. See discussion below at fn. 14.

association. Such a representative action should be found to survive a mootness claim and avoid, as noted below, the cumbersome, expensive and needless class action procedural device. This Court should make clear that an individual plaintiff or group of plaintiffs can sue in a representative capacity:

- to vindicate fundamental, constitutional rights;
- that will effect all others similarly situated;
- to continue with the lawsuit, even after graduation, if necessary, until it is resolved;
- *without* being forced to seek monetary damages or to resort to the cumbersome and expensive[12] class action device of Fed. R. Civ. P. 23, as a procedural device simply to avoid having the mootness defense invoked.

A contrary rule encourages and promotes costly and complex class action litigation, with frequently spurious claims for damages, to resolve claims which could be more easily and appropriately resolved on an individual basis.

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12. The class action procedural device, used principally in antitrust and tort damage cases, has been the subject of much criticism, in part because of its procedural complexities, with class certification, notice and opt out provisions. *See* William Simon, *Class Actions — Useful Tool or Engine of Destruction,* 55 F.R.D. 375, 389 (1972); and Arthur R. Miller, *Comment, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem",* 92 Harv. L. Rev. 664 (1979).

More germane to actions such as this, seeking to establish constitutional rights **where no damage claims are sought,** is a thoughtful article by Timothy Wilton, *The Class Action In Social Reform Litigation: In Whose Interest?,* 63 B.U. L. Rev. 597 (1983).

There, the author at page 599 stresses two fundamental points:

- *First,* plaintiffs may recover the same relief and attorneys' fees in a non-class action against the government agency as they could in a class action.
- *Second,* the only significant difference between class and non-class litigation is the binding effect on the class if the plaintiff loses.

To the same effect, see *Smith v. Lower Merion Township,* Civ. A. No. 90-7501, 1991 WL 205023 (E.D.Pa. Oct. 7, 1991) (Court denies class action certification in a challenge to the constitutionality of a zoning ordinance in order to avoid "the full panoply of procedural paper work" involved in a class action. The court stated the pivotal issue — the ordinance's legality "is perfectly amenable to resolution by one individual test case.").

(2) *Amendment to add new parties:* This Court should reassert the broad discretionary power of judges to allow the amendment of a complaint to add additional parties under Fed. R. Civ. P. 15(a) and 21[13] in the interest of securing "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. In *Mullaney v. Anderson*, 342 U.S. 415 (1952), this Court permitted a similar amendment to substitute new plaintiffs for a plaintiff who did not have standing, reasoning that

> "to dismiss the present petition and require new plaintiffs to start over in the district court would entail needless waste and run counter to effective judicial administration."

Id. at 417. *See also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482 (1990) (moot case remanded to district court to allow amendment of complaint). There is no reason why a similar amendment should not have been permitted here.

D. *Judicial Considerations*

By way of summation, there are as noted above other important judicial considerations impacted by the application of the mootness doctrine in a case such as this:

- Judicial resources are squandered and wasted on needless debates concerning mootness rather than the underlying issues. Litigants and courts strain to find reasons to demonstrate that the case is capable of repetition, often damaging their own credibility.
- The litigants face needless expense and delay Moreover, costly and unnecessary class action litigation (See fn. 12 above) is brough to avoid mootness issues.
- The public confidence in the will and ability of the justice system to promptly decide important public issues is further undermined. This is particularly so with respect to the young people in our colleges and universities who find their case moot, while other individuals pressing other claims are found to fall within an exception.

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13. Fed. R. Civ. P. 15(a) states that leave to amend "shall be freely granted" and Fed. R. Civ. P. 21 grants the power to add parties "at any stage of the action."

• Finally, as noted in section 1 above, such action by defendant can defeat a plaintiff's claims as a prevailing party under 28 U.S.C. 1988; and could have serious consequences by "its chilling effect" on the private bar's willingness to get involved in such cases.[14]

In fact, the record at oral argument on December 16, 1993, in this very case, before a panel of the Second Circuit Court of Appeals, on plaintiff's appeal from the District Court's finding of mootness, establishes this very point — SUNY's real motive, in pressing its mootness defense so vigorously, was to avoid the State's liability to plaintiffs for legal fees, extending over a twelve year period.[15]

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14. As Congress has declared in adopting 28 U.S.C. § 1988, one of its principal reasons was to promote the "private attorney general" concept to encourage the private bar to get involved in just these kinds of cases:

See Riverside v. Rivera, 477 U.S. 561, 577 (1986), ("Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so."); *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983) (Congressional purpose in enacting § 1988 was to ensure effective access to the judicial process for persons with civil rights grievances); *Curtis v. Des Moines,* 995 F.2d 125, 129 (8th Cir. 1993) (clear Congressional intent and purpose of § 1988 was to encourage attorneys to prosecute constitutional violations).

15. During argument by SUNY's counsel, the electronic transcript of the record furnished by the Clerk's Office for the Second Circuit Court of Appeals shows that Judge Winter perceptively identified one of the underlying critical issues in this case, when he stated to SUNY's counsel:

BY JUDGE WINTER: The real problem in this case is that the case has gone on for twelve years and **if the mootness argument prevails, the state gets to hang onto legal fees** that the plaintiffs would be entitled to in a losing first amendment case, and obviously we can see why this point is very heavily litigated.

BY MR. SMIRLOCK: You talk about a losing First Amendment case. So far not so your honor. We are back in the District Court from adjudication. **Obviously legal fees are at issue here.** (emphasis added)

Almost at the very end of SUNY's counsel's argument, Judge Winter asked SUNY why the State was taking such a "rigid position" in not modifying the Regulation at least as to pure free speech.

The colloquy below, and particularly SUNY's counsel's answer as highlighted, further corroborates the concern regarding a rigid application of the mootness defense to a case such as this.

Such misapplication of the mootness doctrine is neither right nor fair and should be corrected by this Court.

BY JUDGE WINTER: I just have one other question. What is wrong with reforming the statute to exclude from its coverage people such as doctors, lawyers and others who might be invited on the campus to perform a service, particularly an emergency service, to allow it? Why is the state taking such a rigid position on the regulation?

BY MR. SMIRLOCK: **I think partly because of the attorney's fees, Your Honor.** I will be glad to submit the brief that we have put in the District Court on the merits. I think strategically we're taking the position for the same reason they're taking the position and just not starting over with new plaintiffs.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that the Court issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit.[16]

Respectfully submitted,

DUANE, MORRIS & HECKSCHER [17]

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16. This Court may wish to consider **summary disposition** of this matter, in light of the argument and cases cited at Section 2.C. pp. 11-13, particularly Chief Justice Rehnquist's concurrence in *Honig v. Doe,* discussed above at Section 3.A. pp. 23-24, to the effect that once this Court assumes jurisdiction and receives briefs and hears oral argument, the case should remain in the federal judicial system until all the issues are decided.

Alternatively, the Court could order that plaintiffs are permitted to amend their complaint to join new plaintiffs under Fed. R. Civ. P. 15(a) and 21, as was done by this Court in *Mullaney v. Anderson,* 342 U.S. at 417. See also discussion in Section 3.C. (2) above at p. 27.

17. Counsel of Record wishes to acknowledge and thank Judith Bernstein-Baker, Director of the Public Service Program at the University of Pennsylvania Law School, and the following students at the Law School, who have provided valuable pro bono assistance, through the Public Service Program, by conducting extensive legal research for this Petition:

Hessup Chung
Robert K. Khedouri

APPENDIX

Time Line – Fox v. Board of Trustees

12/2/82 – Action Filed

6/3/83 – Opinion and Order of District Court granting preliminary injunction (565 F. Supp. 754)

9/10/84 – Amended Complaint filed

9/24/86 to 10/1/86 – Trial

12/12/86 – Opinion and Order of Judge McCurn dismissing the complaint (649 F. Supp. 1393)

4/7/87 – Plaintiffs' Notice of Appeal filed with Second Circuit

3/11/88 – Opinion and Order U. S. Court of Appeals for the Second Circuit reversing and remanding (841 F. 2d 1207)

6/9/88 – Petition for Writ of Certiorari in the United States Supreme Court filed by defendants

10/3/88 – Writ of Certiorari granted by the United States Supreme Court (488 U. S. 815)

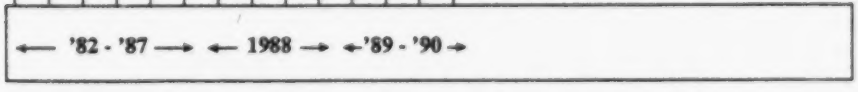
10/3/88 – Opinion and Order of District Court striking down Resolution 66-156 (695 F. Supp. 1409)

6/29/89 – Opinion and Remand Order by the United States Supreme Court (492 U. S. 469)

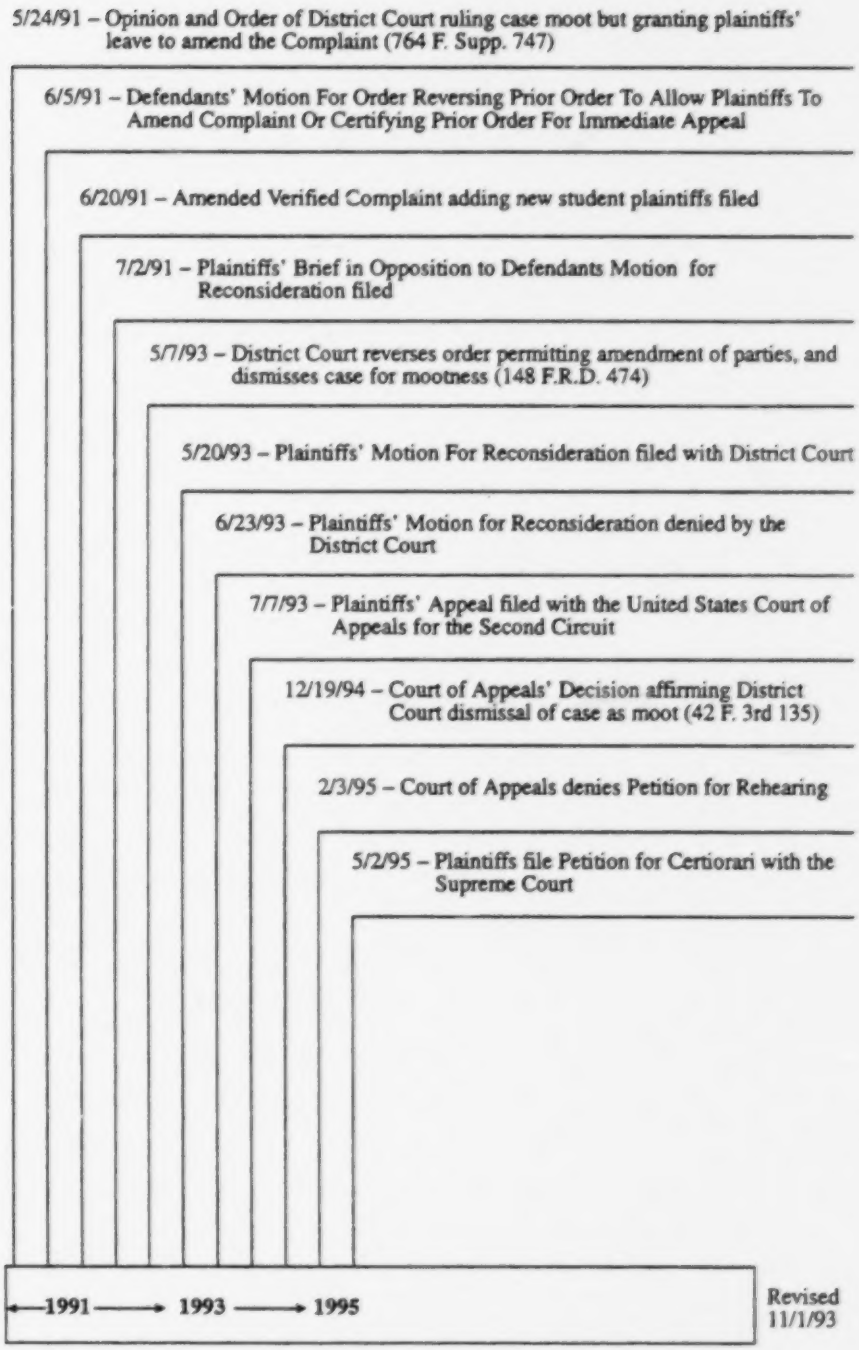
9/26/89 – Remand Order by the U. S. Court of Appeals for the Second Circuit to the District Court

12/13/89 – Telephone conf. with District Court re: procedure / briefing schedule for resolution of case

2/5/90 – Briefs filed with District Court



Time Line – Fox v. Board of Trustees



Outline of Oral Argument Presented to The Second Circuit

NINE REASONS WHY THIS CASE IS NOT MOOT

1. **ARTICLE III — PRUDENTIAL AND FLEXIBLE,** NOT RIGID [Honig, Gerraghty, Brotherhood of Teamsters, Heldman] Appellants' Brief at 13-16, Reply Brief at 5-7.

2. **"REASONABLE LIKELIHOOD"** ISSUES WILL RECUR — EVADE REVIEW [Honig, Carroll] Appellants' Brief at 17-19, Reply Brief at 8-14.

3. PLAINTIFFS, AS INVITEES NOT DEPENDENT ON STATUS AS STUDENTS Appellants' Brief at 16-17, Reply Brief at 14-16.

4. **SIGNIFICANT CONSTITUTIONAL INTERESTS** AT STAKE [Super Tire, Brotherhood of Teamsters] Appellants' Brief at 20-21, Reply Brief at 7-8.

5. A **REPRESENTATIONAL CAPACITY** [Brandon, Trachtman] Appellants' Brief at 33-35, Reply Brief at 14-17.

6. **WAIVER AND DISTRICT COURT DELAY** [cf. Honig] Appellants' Brief at 16-24, Reply Brief at 15-21.

7. **RIGHT TO AMEND** TO ADD **ADDITIONAL PLAINTIFFS** UNDER FED. R. CIV. P. 15 AND 21 [Mullaney, Hackner, Diffenderfer, Bender] Appellants' Brief at 24-27, 31-32, Reply Brief at 21-23.

8. PLAINTIFFS WERE ENTITLED TO **NOMINAL DAMAGES** UNDER FED. R. CIV. P. 54(b) [Beyah, Sapp] Appellants' Brief at 28-31, Reply Brief at 21-23.

9. **"STRONG REASONS"** TO OVERRIDE MOOTNESS DOCTRINE: — e.g. WHERE CASE ROOTED IN FED. JURISDICTION IS ACCEPTED BY U.S. SUPREME COURT — Chief Justice Rehnquist — Concurrence in Honig; (See Attached Concurring Opinion)

cf. Heldman, (Oakes, C.J.) 962 F.2d 148, at 153 fn. 7.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of February, one thousand nine hundred and ninety-five.

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Plaintiffs-Appellants,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS

FILED

FEB 03 1995

GEORGE LANGE III, CLERK

SECOND CIRCUIT

Dkt No: 93-7715

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellants Todd Fox et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /s/ Carolyn Clark Campbell
Carolyn Clark Campbell,
Chief Deputy Clerk

Todd FOX, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan, Jaclyn Bernstein, Glen Magpantay, William Weitz, Corey Anthony, Diego Munoz, Edward Fagan, Baycan Fideli, Jodie Green and Jeffrey Luks, Plaintiffs-Appellants,

v.

The BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK and Clifton R. Wharton, Jr., individually and as Chancellor of the Board of Trustees and the State University of New York College at Cortland, and James M. Clark, individualy and as President of the College at Cortland, and the State University of New York at Binghamton, and Clifford D. Clark, individually and as President of the State University of New York at Binghamton, and the State University of New York at Albany, and Vincent O'Leary, individually and as President of the State University of New York at Albany, and the State University of New York College of Arts and Sciences at Potsdam, and Humphrey Tomkin, individually and as President of the College of Arts and Sciences at Potsdam, Defendants-Appellees.

No. 780, Docket 93-7715.

United States Court of Appeals,
Second Circuit.

Argued Dec. 16, 1993.

Decided Dec. 9, 1994.

Students brought action against state university seeking declaratory and injunctive relief on First Amendment grounds against regulation that operated to bar private commercial businesses from engaging in sales demonstrations in students' dormitory rooms. The United States District Court for the Northern District of New York, 649 F.Supp. 1393, entered judgment denying relief. The Court of Appeals reversed and remanded, 841 F.2d 1207. State university and related parties petitioned for certiorari. Thereafter, the District Court granted relief to students, 695 F.Supp. 1409, but those proceedings

were stayed when Supreme Court granted petition for certiorari. The Supreme Court, 492 U.S. 469, set forth appropriate standard and remanded matter for determination of validity of regulation. The Court of Appeals, 764 F.Supp. 747, issued mandate remanding matter. The District Court, Neal P. McCurn, J., dismissed case as moot, 148 F.R.D. 474, and students appealed. The Court of Appeals, Mahoney, Circuit Judge, held that: (1) claim of mootness could not be waived; (2) action was moot because students were no longer enrolled at university; (3) claim for nominal damages or claim of representational capacity would not be read into complaint to preclude mootness; and (4) complaint was not within exception to mootness doctrine for issues capable of repetition, yet evading review.

Affirmed.

Mootness was matter of subject matter jurisdiction that could not be waived and that could be raised at any time. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Defects in subject matter jurisdiction cannot be waived and may be raised at any time during proceedings. U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ. Proc.Rule 12(h)(3) 28 U.S.C.A.

Action by students seeking declaratory and injunctive relief on First Amendment grounds against state university regulation that operated to bar private commercial businesses from engaging in sales demonstrations in students' dormitory rooms was moot, where students were no longer enrolled at university; relief sought in complaint could provide no legally cognizable benefits to students once they had left state university system. U.S.C.A. Const. Art. 3, § 2, cl. 1; Amend. 1

Case is "moot," and accordingly federal courts have no jurisdiction over litigation, when parties lack legally cognizable interest in outcome; plaintiff must have "personal stake" in litigation to have legally cognizable interest. U.S.C.A. Const. Art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

Nominal damages are available in actions alleging violations of constitutionally protected rights.

Request for nominal damages would not be read into students' complaint challenging constitutionality of state university regulation barring private commercial businesses from engaging in sales demonstrations in students' dormitory rooms, so as to stave off dismissal for mootness based upon fact that students were no longer enrolled at university, as it appeared that available Eleventh Amendment and qualified immunity defenses would have precluded any successful claim for money damages and there was no final judgment pursuant to which complete relief could be granted. U.S.C.A. Const. Art. 3, § 2, cl. 1; Amends. 1, 11; Fed.Rules Civ.Proc.Rule 54(c), 28 U.S.C.A.

Students challenging constitutionality of state university regulation barring private commercial businesses from engaging in sales demonstrations in students' dormitory rooms would not be regarding as having litigated case in representational capacity, so as to stave off dismissal for mootness based upon fact that students were no longer enrolled at university, where students did not make any attempt to have class certified and in fact never alleged in their pleading that they were bringing action on behalf of themselves and all other similarly situated. U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Students' suit challenging under First Amendment state university regulation barring private commercial businesses from engaging in sales demonstrations in students' dormitory rooms did not come within exception to mootness doctrine, after students were no longer enrolled at university, for issues capable of repetition, yet evading review, as there was no reason to believe that issue presented could not be litigated in four-year span of standard undergraduate education and there was no reasonable expectation beyond bare statement of intention of reenrollment that same students would be subjected to same action again. U.S.C.A. Const. Art. 3, § 2, cl. 1; Amend. 1.

Once case was moot, it was no longer justiciable in federal court and had to be dismissed, and plaintiffs could not be permitted to amend their complaint to add additional parties. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Henry T. Reath, Philadelphia, PA (Wayne A. Mack, Richard W. Riley, Marc H. Perry, Duane, Morris & Heckscher, of counsel), for plaintiffs-appellants.

Daniel Smirlock, Asst. Atty. Gen. of the State of New York, Albany, NY (Robert Abrams, Atty. Gen. of the State of New York, Peter H. Schiff, Deputy Sol. Gen. of the State of New York, Nancy A. Spiegel, Asst. Atty. Gen. of the State of New York, of counsel), for defendants-appellees.

Before: MAHONEY and WALKER, Circuit Judges, and EGINTON, District Judge.*

MAHONEY, Circuit Judge:

Plaintiffs-appellants ("Plaintiffs"), individuals who at or following the commencement of this action were students in the State University of New York ("SUNY") system, appeal from a judgment entered May 11, 1993 in the United States District Court for the Northern District of New York, Neal P. McCurn, Judge, that dismissed as moot their amended complaint (the "Complaint") seeking declaratory and injunctive relief on First Amendment grounds against a SUNY regulation that operated to bar private commercial businesses from engaging in sales demonstrations in students' dormitory rooms, and denied leave to file and amended complaint. *See Fox v. Board of Trustees of the State Univ.*, 148 F.R.D 474 (N.D.N.Y.1993) ("*Fox VI*") (opinion supporting judgment).

In a prior memorandum-decision and order entered May 24, 1991, the district court had concluded that Plaintiffs' claims were moot because all of the Plaintiffs were no longer SUNY students and thus could not benefit from the declaratory and injuctive relief sought in the Complaint, rejecting various contentions by Plaintiffs to the contrary that are reiterated on this appeal and addressed subsequently in this opinion. *See Fox v. Board of Trustees of the State Univ.*, 764 F.Supp. 747, 751-57 (N.D.N.Y.1991) ("*Fox V*"). The court has also ruled, however, that Plaintiffs could further amend the Complaint by adding additional plaintiffs who could benefit from declaratory or

*The Hon. Warren W. Eginton, United States District Judge for the District of Connecticut, sitting by designation.

injunctive relief, and thus stave off dismissal. *See id.* at 757-59. On June 10, 1991, defendants-appellees ("Defendants") moved for modification of this order, seeking dismissal of the Complaint due to mootness without leave to amend to cure the defect. *See Fox VI,* 148 F.R.D. at 476. The court reaffirmed its finding that the claims was moot, but granted Defendants' motion to modify the court's prior order, denied leave to amend the Complaint, and dismissed the Compalint. *See Fox VI,* 148 F.R.D. at 489.

On this appeal, Plaintiffs argue that the district court erred in: (1) dismissing the Complaint as moot; (2) failing to allow amendment of the Complaint; and (3) failing to enter judgment in Plaintiffs' favor. We conclude that because the relief sought in the Complaint could provide no benefit to Plaintiffs' once they were no longer students in the SUNY system, and because this case does not fall within any exception to the doctrine of mootness, the district court properly dismissed the case as moot. Further, we conclude that the absence of any remaining Plaintiffs with a legally cognizable personal interest in the outcome of the litigation precludes any amendment of the Complaint to add additional plaintiffs.

We accordingly affirm the judgment of the district court.

Background

The facts of this case have been extensively detailed several times during the course of this protracted litigation, and will be recounted here only as necessary to elucidate the issues presented on this appeal. This case arose when Todd Fox, a student at SUNY Cortland, was deined permission to host, in his dormitory room on the SUNY Cortland campus, a cookware demonstration sponsored by American Future Systems, Inc. ("AFS"), "a corporation engaged in selling cookware . . . to college students through group demonstrations." *Fox V,* 764 F.Supp. at 749 n. 1. Fox was denied permission to host such an event pursuant to SUNY Resolution No. 66-156 (the "Resolution"), which provides in pertinent part that:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in

> facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

Fox V, 764 F.Supp. at 749.

Following the denial of permission for Fox to host the demonstration, AFS, an AFS representative, and Fox commenced this action, claiming that the Resolution violated their First Amendment rights and seeking a preliminary injunction premitting Fox to host an AFS-sponsored cookware demonstration in his dormitory rooms. *See id.; see also Fox v. Board of Trustees of the State Univ.,* 841 F.2d 1207, 1208 (2d Cir.1988) ("*Fox II*"), *rev'd and remanded,* 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The district court initially concluded that the Resolution would not satisfy the requirements set forth by the Supreme Court for the regulation of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), because the Resolution did not "directly advance the governmental interests asserted," and was "more extensive than necessary to service such interests." *American Future Sys. v. State Univ.,* 565 F.Supp. 754, 767 (N.Y.D.N.Y.1983) ("*AFS V. SUNY*"); *see also Fox V,* 764 F.Supp. at 749-50. Accordingly, the court issued the preliminary injunction sought by the plaintiffs in that case. *See AFS v. SUNY,* 565 F.Supp. at 770-71; *see also Fox V,* 764 F.Supp. at 750.

Following the issuance of the preliminary injunction, the complaint was amended to challenge "interim" regulations promulgated by SUNY after the court issued the injunction, to drop the AFS representative as a plaintiff, to add as plaintiffs several students at other SUNY campuses, and to add as defendants SUNY officials at those campuses. *See Fox V,* 764 F.Supp. at 750; *Fox II,* 841 F.2d at 1210 n. 1. The court extended the prelimninary injuction to these additional defendants. *See Fox II,* 841 F.2d at 1210 n. 1. The amended complaint was tried to the district court, which dismissed the complaint and granted judgment for Defendants, holding that SUNY "ha[d] not created a public forum for the commercial

speech at issue," and that the Resolution was "viewpoint-neutral and reasonable in relation to the forum's purpose." *Fox v. Board of Trustees of the State Univ. of New York*, 649 F.Supp. 1393, 1401 (N.D.N.Y.1986) ("*Fox I*"), *rev'd and remanded*, 841 F.2d 1207 (2d Cir.1988), *rev'd and remanded*, 492 U.S. 469 (1989); *See also Fox V*, 764 F.Supp. at 750.[1]

The plaintiffs appealed to this court. During the pendency of that appeal, AFS withdrew as a party and proceeded only as an amicus. *See Fox II*, 841 F.2d at 1208; *see also Fox V*, 764 F.Supp. at 750. This court reversed the district court's judgment and remanded for the district court to determine whether the Resolution directly advanced the asserted governmental interests and whether the Resolution was the least restrictive means available to advance those interests. *Fox II*, 841 F.2d at 1213-14.

Upon remand, and while a petition for certiorari filed by Plaintiffs was pending, the district court ruled that, assuming that the Resolution and the interim regulations directly advanced SUNY's asserted interests, neither the Resolution nor the interim regulations were "the least restrictive means for advancing those interests." *Fox v. Board of Trustees of the State Univ.*, 695 F.Supp. 1409, 1413-14 (N.D.N.Y.1988) ("*Fox III*"). Accordingly, the court held that both the Resolution and the interim regulations violated the First Amendment. *Id.* at 1414. However, on the same day that the district court's decision was issued, October 3, 1988, the Supreme Court granted the petition for certiorari. *Board of Trustees of the State Univ. v. Fox*, 488 U.S. 815, 109 S.Ct. 52, 102 L.Ed.2d 31 (1988). Accordingly, the proceedings in the district court were stayed pending the Supreme Court's decision in the case. *See Fox V*, 764 F.Supp. at 750 & n. 17.

The Supreme Court concluded that SUNY could adopt speech-restrictive regulations that "employ[] not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Board of Trustees of the*

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1. The court declined to consider separately the challenge to the interim regulations. *See Fox I*, 649 F.Supp. at 1402, *see also Fox V*, 764 F.Supp. at 750 n. 10.

State Univ. v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034-35, 106 L.Ed.2d 388 (1989) ("*Fox IV*"); *see also Fox II,* 841 F.2d at 1215 (Mahoney, J., dissenting). Also noting that the Resolution allegedly infringed upon some noncommercial spech, thereby posing a question of overbreadth, *see Fox IV,* 492 U.S. at 481-84, 109 S.Ct. at 3035-37, the Supreme Court reversed the judgment of this court and remanded for a "determination . . . of the validity of [the Resolution's] application to the commercial and noncommercial speech [at issue]; and, if its application to speech in either such category is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable." *Id.* at 486, 109 S.Ct. at 3038. This court then issued a mandate remanding the case to the district court, consistent with the directive of the Supreme Court. *See Fox V,* 764 F.Supp. at 751.

By this time, the remaining Plaintiffs were no longer students in the SUNY system. *See id.* Upon remand, the district court thoroughly examined the issue of mootness, and, as previously recited, concluded, in *Fox V* that the case was moot because the remaining Plaintiffs were no longer SUNY students and had no "legally cognizable interest in the outcome" of the case. *Id.* at 751, 758-59. The court also concluded, however, that "grant[ing] plaintiffs leave to amend their complaint will cause no prejudice to the defendants and will advance this matter to a resolution on its merits." *Id.* at 759. Accordingly, the court granted Plaintiffs leave to amend the Complaint to include current SUNY students as plaintiffs, and declined to dismiss the Complaint. *Id.*

Defendants then moved for modification of this order, seeking a dismissal of the Complaint due to mootness, rather than allowing an amendment of the Complaint to cure the defect. *Fox VI,* 148 F.R.D. at 476. Further, although the Plaintiffs had not formally moved for reconsideration of the mootness determination in *Fox V,* in the interest of completeness the court considered arguments advanced by Plaintiffs for reconsideration of the court's conclusion that the case was moot. *See Fox VI,* 148 F.R.D. at 477 n. 6. The court reaffirmed its finding that the case was moot, but granted Defendants' motion for reconsideration, ordering that "that portion of

[Fox V] which permitted plaintiffs to amend their complaint pursuant to Rule 15(a) [to avoid a dismissal for mootness] be deleted," 148 F.R.D. at 489, and dismissed the Complaint. *Id.* On May 19, 1993, Plaintiffs sought reconsideration of *Fox VI* in the district court, and the court denied that motion on June 23, 1993.

This appeal followed.

Discussion

Plaintiffs argue primarily that: (1) the Defendants waived their right to assert a defense based on mootness; (2) the Complaint should be read to include a claim for nominal damages; (3) the case is not moot because Plaintiffs sued in a representational capacity; (4) the case falls within the "capable of repetition, yet evading review" exception to mootness; and (5) the court should have permitted the amendment of the complaint to add additional plaintiffs. We consider these arguments in turn.

A. *Waiver and Mootness.*

[1] Plaintiffs' "waiver" argument ignores the jurisdictional nature of the Article III requirement that federal courts adjudicate only "Cases" and "Controversies." *See DeFunis v. Odegaard,* 416 U.S. 312, 316, 94 S.Ct. 1704, 1705-06, 40 L.Ed.2d 164 (1974) (per curiam) ("The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' " (quoting *Liner v. Jafco, Inc.,* 375 U.S. 301, 306 n. 3 84 S.Ct. 391, 394 n. 3, 11 L.Ed.2d 347 (1964))).[2]

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2. Plaintiffs point to a statement in a concurring opinion by Chief Justice Rehnquist in *Honig v. Doe,* 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988), that "while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is attenuated connection that may be overridden when there are strong reasons to override it." *Id.* at 331, 108 S.Ct. at 608 (Rehnquist, C.J., concurring). They also invoke an observation in *Heldman v. Sobol,* 962 F.2d 148, 154 n. 7 (2d Cir. 1992), that the mootness doctrine may be premised upon prudential, rather than

[2] When a case becomes moot, the federal courts "lack[ ] subject matter jurisdiction over the action." *New York City Employees' Retirement Sys. v. Dole Food Co.*, 969 F.2d 1430, 1433 (2d Cir.1992). Defects in subject matter jurisdiction cannot be waived and may be raised at any time during the proceedings. *See Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y.1986) ("The mootness doctrine is an elemental limitation on federal judicial power, and its effect may not be waived by a party."); *see also* Fed. R.Civ.P. 12(h)(3).

[3, 4] A case is moot, and accordingly the federal courts have no jurisdiction over the litigation, when " 'the parties lack a legally cognizable interest in the outcome.' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950-51, 23 L.Ed.2d 491 (1969)); *see also North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971) (per curiam) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them); *Bragger v. Trinity Capital Enter. Corp.*, 30 F.3d 14, 16 (2d Cir.1994) (same). The required legally cognizable interest has alternatively been described as a requirement that a plaintiff have a "personal stake" in the litigation. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct.

NOTES *(Continued)*

constitutional, considerations. *See also United States v. IBT*, 955 F.2d 171, 174 (2d Cir.1992) (recognizing "flexible" nature of mootness doctrine).

In our view, both the *Honig* majority opinion, 484 U.S. at 317-18, 108 S.Ct. at 601, and the subsequent, unanimous rulings of the Court in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78, 110 S.Ct. 1249, 1253-54, 108 L.Ed.2d 400 (1990), make it quite clear that the mootness doctrine is based upon the case or controversy requirement of Article III of the Constitution. We are fortified in this conclusion by the Court's recent, unanimous declaration that "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all stages of appellate review." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, ___, 115 S.Ct. 386, 389, 130 L.Ed.2d 233 (1994) (citations omitted).

1202, 1208, 63 L.Ed.2d 479 (1980); *see also Franks v. Bowman Transp. Co.,* 424 U.S. 747, 755, 96 S.Ct. 1251, 1259-60, 47 L.Ed.2d 444 (1976); *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

"[T]he mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit, including the pendency of the appeal" *Cook v. Colgate Univ.,* 992 F.2d 17, 19 (2d Cir.1993) (citations omitted) (equitable claims against university mooted by graduation of plaintiffs). This court has consistently held that students' declaratory and injunctive claims against the universities that they attend are mooted by the graduation of the students, because after their graduation and absent a claim for damages, " 'it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the injury.' " *Cook,* 992 F.2d at 19 (quoting *Alexander v. Yale Univ.,* 631 F.2d 178, 183 (2d Cir.1980)). The relief sought in the Complaint could provide no legally cognizable benefits to Plaintiffs once they had left the SUNY system. *See Cook,* 992 F.2d at 19.[3] Accordingly, the district court applied well settled law and concluded that this case was moot. Further, the condition of mootness is not a defense that could be waived by the Defendants, but rather is a condition that deprives the court of subject matter jurisdiction.

B. *Nominal Damages as Precluding Mootness*

[5] The inability of the courts to provide relief to Plaintiffs after they left the SUNY system is logically dependent upon the absence of a claim for damages, because relief in the form of damages for a past violation of their constitutional rights is not adversely affected by that departure. *See University of Tex. v. Camenisch,* 451 U.S. 390, 393-94, 101 S.Ct. 1830, 1832-33, 68 L.Ed.2d 175 (1981); *Cook,* 992 F.2d at 19; *Stokes v. Village of Wurtsboro,* 818 F.2d 4, 6 (2d Cir.1987) (collecting

3. We address in section D of this Discussion Plaintiffs' claim that possible future attendance at a SUNY unit by one or more Plaintiffs precludes a determination of mootness.

authorities). It is clear that nominal damages are available in actions alleging violations of constitutionally protected rights. *See, e.g., Carey v. Piphus,* 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978). Plaintiffs argue that because they are seeking to recover nominal damages, this case is not moot.

[6] This contention fails primarily because "there is absolutely no specific mention in [the Complaint] of nominal damages. Nor can a request for such damages be inferred from the language of [the Complaint]." *Fox V,* 764 F.Supp. at 756. Plaintiffs advance three arguments in support of their claim that they should nonetheless be entitled to pursue nominal damages and thereby stave off a dismissal for mootness: (1) the prayer in the Complaint for "such other relief as the Court deems just and proper" (in addition to declaratory relief and attorney fees[4]) provides a basis for an award of nominal damages; (2) Fed.R.Civ.P. 54(c), which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings," also provides a basis to award nominal damages; and (3) in any event, they should be permitted to amend the complaint to seek nominal damages.

The Primary case relied upon by Plaintiffs is *Sapp v. Renfroe,* 511 F.2d 172 (5th Cir. 1975). In *Sapp,* the plaintiff sued a high school, seeking declaratory and injunctive relief against the school for assertedly denying him admission in violation of his constitutional rights. Although the plaintiff had graduated from another high school by the conclusion of the trial, the court concluded that the actual damages proved by the plaintiff (i.e., the tuition paid to the other high school) saved the case from being moot even though the complaint did not request damages relief. *See id* at 175-76.

The actual disposition in *Sapp,* however, was as follows: "Since we find Sapp's demand for compensatory damages, the

4. Plaintiffs do not contend on appeal that their claim to attorney fees precludes a determination of mootness. Any such claim would be barred by *Lewis,* 494 U.S. at 480, 110 S.Ct. at 1255.

only demand which has not been rendered moot by his graduation, to be barred by the qualified immunity of [the defendants], we affirm the judgment of the district court [dismissing Sapp's complaint]." *Id.* at 175. Defendants in this case contend that if a damages claim had been asserted in the Complaint, they would succeessfully have defended against that claim in their official capacities by asserting an Eleventh Amendment defense, see *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989), and in their individual capacities by asserting a qualified immunity defense. *See Harlow v. Fitzgerald,* 457 U.S. 800 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

These arguments are persuasive. *Will* would indeed bar a § 1983 claim for damages against Defendants in their official capacities, because "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will,* 491 U.S. at 71, 109 S.Ct. at 2312. As to qualified immunity, in view of the tortured history of this case, it can hardly be maintained that the rights which Plaintiffs seek to vindicate in this litigation were "clearly established," *see Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738, when they commenced this suit in December 1982, Plaintiffs' protestations to the contrary notwithstanding. It thus seems apparent that defenses available to Defendants would have precluded any successful claim for money damages, nominal or otherwise, in this case.

We are especially reluctant in these circumstances to read a damages claim into the Complaint's boilerplate prayer for "such other relief as the Court deems just and proper," or to conclude that the district court should have exercised its discretion to permit an amendment of the Complaint to seek nominal damages. As to Fed.R.Civ.P. 54(c), there is no "final judgment" for Plaintiffs in this case upon which the rule may operate. As Plaintiffs point out, there was such a final judgment in *Fox III* on remand from our decision in *Fox II,* but that judgment was stayed and is effectively inoperative in view of the Supreme Court's decision in Fox *IV.*

Plaintiffs invoke our ruling in *Beyah v. Coughlin,* 789 F.2d 986, 989 (2d Cir.1986), that a claim for nominal damages can suffice to avoid mootness when claims for injunctive and

declaratory relief have become moot The complaint in *Beyah*, however, explicitly sought compensatory and punitive damages. *See id.* at 987; *see also Fox VI,* 148 F.R.D. at 479. Especially in the circumstances presented here, we perceive no basis to allow a belated claim for damages "to breathe life into a moribund dispute." *McCabe v. Nassau County Medical Ctr.,* 453 F.2d 698, 702 (2d Cir.1971); *see also R.S. & V. Co. v. Atlas Van Lines,* 917 F.2d 348, 351 (7th Cir.1990) (failure to seek actual or nominal damages rendered contract claim moot); *Goichman v. City of Aspen,* 590 F.Supp. 1170, 1173-74 (D.Col.1984) (plaintiff's individual claims deemed moot when he was entitled only to nominal damages and "no prayer appears in the Complaint for such nominal damages"), *aff'd on other grounds and remanded,* 859 F.2d 1466 (10th Cir.1988).

C. *Representational Capacity.*

[7] Plaintiffs also assert that the case is not moot because they were litigating in a representational capacity. As the district court noted, however, Plaintiffs "obviously have not made any attempt to have a class certified under Fed.Rule Civ.Proc. 23." *Fox V,* 764 F.Supp. at 754. As we recently stated, "in general, if the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot." *Comer v. Cisneros,* 37 F.3d 775, 798 (2d Cir.1994) (citing Board of *Sch. Comm'rs v. Jacobs,* 420 U.S. 128, 129-30, 95 S.Ct. 848, 849-50, 43 L.Ed.2d 74 (1975) (per curiam)); *see also Ahmed v. University of Toledo,* 822 F.2d 26, 27 (6th Cir.1987).

Plaintiffs point out that in *Trachtman v. Anker,* 563 F.2d 512, 514 n. 1 (2d Cir.1977), *cert. denied,* 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978), and *Brandon v. Board of Education,* 487 F.Supp. 1219, 1224-25 (N.D.N.Y.), *aff'd,* 635 F.2d 971 (2d Cir.1980), *cert. denied,* 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981), both decided after *Jacobs,* high-school-student plaintiffs were found to have a continuing stake in litigation even after their graduation from high school because the court concluded that they were suing in a representational capacity, in spite of the fact that no class certification had occurred. In both *Anker* and *Brandon* however, the pleadings explicitly asserted that the student plaintiffs were acting in a

representative capacity on behalf of themselves and other students similarly situated. *See Anker,* 563 F.2d at 514 n. 1; *Brandon,* 487 F.Supp. at 1224-25.

These cases are therefore distinguishable because "the pleadings before the court here do not demonstrate that plaintiffs are bringing this action on behalf of themselves and all others similarly situated." *Fox V,* 764 F.Supp. at 754; *cf Cook,* 992 F.2d at 20 ("Unlike *Brandon* and *Trachtman,* . . . the complaint herein sought . . . relief solely on behalf of the plaintiffs individually, not as representatives. . . ."). In *Brandon* furthermore, some of the student-plaintiffs had not yet graduated, *see* 487 F.Supp. at 1224, and a viable damages claim remained in the case. *See id,* at 1225.

D. *"Capable of Repetition, Yet Evading Review" Exception to Mootness.*

[8] Plaintiffs argue that this case falls within the "capable of repetition, yet evading review" exception to mootness. In cases such as this, in which, as we have just explained, plaintiffs have sued in an individual rather than a representational capacity, this exception to mootness applies only if: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the *same complaining party* would be subjected to the same action again." *Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (per curiam) (emphasis added); *see also Lewis,* 494 U.S. at 481, 110 S.Ct. at 1256; *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975) (per curiam).

Addressing the first prong of this test, there is no reason to believe that the issue presented by this case could not be litigated in the four-year span of a standard undergraduate education. The present litigation has taken considerably longer because, *inter alia,* this court reversed the district court's articulation of the governing rule of law, and the Supreme Court in turn reversed this court on that issue. Now that the Supreme Court has defined the applicable rule, however, there is no reason to anticipate a similarly lengthy course of litigation if the issue were presented in a fresh lawsuit. In

any event, the available mechanism of a class action would preclude a dismissal for mootness.

As to the second prong of the *Murphy* test, we have described the requisite likelihood of repetition as a "demonstrated probability" or a "reasonable expectation." *Deeper Life Christian Fellowship, Inc. v. Sobol,* 948 F.2d 79, 82 (2d Cir.1991); *see also McFarlin v. Newport Special Sch. Dist.,* 980 F.2d 1208, 1211 (8th Cir.1992) ("A mere 'physical or theoretical possibility' is insufficient; a ' "demonstrated probability" ' must be shown." (quoting *Murphy,* 455 U.S. at 482, 102 S.Ct. at 1183 (quoting *Weinstein,* 423 U.S. at 149, 96 S.Ct. at 349))).

Plaintiffs argue that one of their number could return to the SUNY system as a graduate student, and thus be subjected to the Resolution in the future. In support of this contention, Plaintiffs seek to supplement the record on appeal by proffering affidavits indicating that one of the Plaintiffs left the SUNY system lacking two credits for graduation and intends to complete his studies at SUNY, and that there is "a very real possibility and a reasonable expectation" that four other Plaintiffs who graduated may take some additional courses at SUNY "within the next few years."

The motion to supplement the record was granted by the author of this opinion prior to oral argument, subject to reconsideration by the panel, as a matter of administrative convenience. However, this evidence is not a proper supplement to the record as contemplated by Fed.R.App.P. 10(e). *See Deeper Life,* 948 F.2d at 82 (questioning whether court should consider affidavit not before district court but submitted on appeal to demonstrate case not moot); *cf Lewis,* 494 U.S. at 480, 110 S.Ct. at 1255 (Court "not disposed to accept such an affidavit as dispositive, without providing [adversary] the opportunity of rebuttal"). Plaintiffs were certainly on notice that the justiciability of the case was at issue when the district court issued *Fox V* in May 1991. Accordingly, there was ample opportunity to present any appropriate affidavits to the district court in the two years that ensued between *Fox V* and *Fox VI.*

In any event, consideration of the affidavits would not affect the outcome of this case. They merely show that several of the Plaintiffs have expressed an intention to return to the

SUNY system.[5] There is no indication that any of the Plaintiffs have even applied to the SUNY system, much less been accepted. The bare statement of intention is insufficient to escape mootness. *Cf. Deeper Life,* 948 F.2d at 82 (no exception to mootness based upon affidavit expressing intent to engage in conduct that would resuscitate litigated issue when, despite affidavit and previous similar predictions, such conduct had not occurred). In this case, moreover, the expressed intention to return to the SUNY system is not solely within Plaintiffs' power to accomplish; they would also have to be accepted by a school in the SUNY system.

E. *Further Amendment of Plaintiffs' Complaint.*

[9] Plaintiff, also sought to avoid dismissal by amending their complaint to add additional student plaintiffs who were still attending SUNY institutions. We affirm substantially for the reasons stated in the thorough analysis of district court in its opinion granting defendants' motion for modification. *See Fox VI,* 148 F.R.D. at 482-89. The district court correctly concluded that once a case is moot, it is no longer justiciable in federal court and must be dismissed. *See id.* at 483. Accordingly, the district court did not abuse its discretion in denying Plaintiffs permission to amend their complaint after the case had become moot.

CONCLUSION

The judgment of the district court is affirmed.

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5. In a postargument submission pursuant to Fed. R.App.P. 28(j), Plaintiffs called to our attention *Washegesic v. Bloomingdale Public Schools,* 33 F.3d 679 (6th Cir.1994), in which a student at a high school sued to have a religious picture removed from the school on First Amendment grounds, and graudated from the school after achieving a favorable district court decision that the defendants appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit ruled that the appeal was not moot because the prominently placed painting impacted upon visitors to the school as well as students, and the plaintiff continued to visit the school on a regular basis. *See* 33 F.3d at 681. Assuming that this case is correctly decided, it is distinguishable. The Complaint asserts the rights of students, not visitors, to host and attend sales demonstrations in dormitories on SUNY campuses.

Plaintiffs' motions to compel are granted but only to the extent noted above.

SO ORDERED.

Todd FOX, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan and Jaclyn Bernstein, Plaintiffs,

v.

The BOARD OF TRUSTEES OF the STATE UNIVERSITY OF NEW YORK, and Clifton R. Wharton Jr., Individually and as Chancellor of the Board of Trustees and the State University of New York College at Cortland, and James M. Clark, Individually and as President of the College at Cortland, and the State University at Binghamton, and Clifford D. Clark, Individually and as President of the State University of New York at Binghamton, and Vincent O'Leary, Individually and as President of the State University of New York at Albany, and the State University of New York College of Arts and Sciences at Potsdam, and Humphrey Tomkin, Individually and as President of the College of Arts and Sciences at Potsdam, Defendants.

No. 82-CV-1363.

United States District Court,
N.D. New York.

May 7, 1993.

Corporation and students brought action seeking declaratory and injunctive relief against board of trustees of state university system based upon refusal of universities and officials to permit corporation to conduct product demonstrations in campus dormitory rooms. The United States District Court for the Northern District of New York, 649 F.Supp. 1393, granted relief in part, and appeal was taken. The Court of Appeals, 841 F.2d 1207, reversed and remanded. On remand, the District Court, 695 F.Supp. 1409, granted relief. Subsequently, the Supreme Court granted petition for writ of certio-

rari. The Supreme Court, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388, reversed decision of Court of Appeals and remanded. On remand, the District Court, 764 F.Supp. 747, allowed amendment of complaint. University defendants filed motion for reconsideration. The District Court, McCurn, Senior District Judge, held that: (1) action was moot when plaintiff students had graduated, and (2) complaint could not be amended to substitute currently enrolled students as plaintiffs.

So ordered.

Plaintiffs' argument for reconsideraton would be considered, even though defendants, not plaintiffs, had moved for reconsideration, since consideration of argument would be consistent with liberal manner in which district court had overlooked, where possible, procedural irregularities by parties to litigation. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

Rule allowing final judgment to grant relief to which party in whose favor it is rendered is entitled, empowers court to award prevailing party relief justified by evidence adduced at trial, even if such relief was not specifically requested in that party's pleading. Fed.Rules Civ.Proc.Rule 54(c), 28 U.S.C.A.

Rule allowing final judgment to grant relief to which party in whose favor it is rendered is entitled could not be used as vehicle for reviving otherwise moot action by allowing nominal damages claim to be read into complaint after action became moot. Fed.Rules Civ.Proc.Rule 54(c), 28 U.S.C.A.

Nominal damages may be available in civil rights action, even without a showing of actual injury.

Mere availability of nominal damages cannot by itself save case from becoming moot.

Allegation in complaint that amount in controversy exceeded sum of $10,000, exclusive of interest and costs, did not adequately put defendants on notice that plaintiffs were seeking nominal damages, and, thus, did not preclude dismissal of action on mootness grounds; jurisdiction in case was not predicated on diversity of citizenship.

Fact that "wherefore" clause in complaint requested such other relief as court would deem just and proper was not suf-

ficient to show that civil rights plaintiffs were seeking nominal damages, and, thus, did not preclude dismissal of complaint on mootness grounds.

Claim that doctrine of qualified immunity precluded recovery of nominal damages was not properly before district court in civil rights action, where defendants failed to allege qualified immunity defense in their answer.

Any request to amend civil rights complaint, which challenged constitutionality of state university's resolution prohibiting group sales demonstrations in dormitories, to seek nominal damages would be futile and improper, where it appeared that constitutional rights asserted by students were not clearly established at time of alleged violation, and, thus, university defendants would in all likelihood be entitled to qualified immunity from claim of nominal damages. U.S.C.A. Const. Amend. 1; Fed.Rules Civ. Proc.Rule 15(A), 28 U.S.C.A.

Generally, if case has become moot while on appeal, defendant is entitled to dismissal as matter of right.

When action becomes moot, it no longer presents live case or controversy, and, thus, federal court must dismiss that case because it lacks subject-matter jurisdiction to entertain it. U.S.C.A. Const. Art. 3, § 1 et seq.

Action brought by students to challenge constitutionality of state university's resolution prohibiting group sales demonstrations in dormitories had to be dismissed when action become moot because plaintiff students had graduated.

Rule allowing parties to be dropped or added by court order at any stage of action was not enacted as means for party to avoid dismissal on mootness grounds. Fed.Rules Civ.Proc.Rule 21, 28 U.S.C.A.

Amendment of complaint, which was brought by students to challenge constitutionality of state university's resolution prohibiting group sales demonstrations in dormitories, to substitute currently enrolled students for plaintiff students was not warranted under rule allowing parties to be dropped or added at any stage of action, where action had become moot due to plaintiffs' graduation. Fed.Rules Civ.Proc.Rule 21, 28 U.S.C.A.

Rule allowing parties to be dropped or added by court order at any stage of action cannot be employed as means to create case or controversy through substitution where one no longer exists. Fed.Rules Civ.Proc. Rule 21, 28 U.S.C.A.

Rule providing that leave to amend shall be freely given when justice so requires did not provide basis to allow amendment of complaint, which challenged constitutionality of state university's resolution prohibiting group sales demonstrations in dormitories, to substitute currently enrolled students for plaintiff students, where action had become moot due to plaintiff students' graduation. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

If complaint is dismissed for failure to state cause of action due to jurisdictional defect, then that dismissal should be without prejudice to replead so as to cure the defect.

Duane Morris & Heckscher, Philadelphia, PA (Henry T. Reath, Wayne A. Mack Jr., Richard W. Riley, of counsel), for plaintiffs.

Robert Abrams, Atty. Gen. of the State of N.Y., Albany, NY (O. Peter Sherwood, Sol. Gen., Peter H. Schiff, Deputy Sol. Gen., Lawrence L. Doolittle, Daniel Smirlock, Asst. Attys. Gen., of counsel), for defendants.

McCURN, Senior District Judge.

Very basically, this case involves a constitutional challenge to a State University of New York ("SUNY") resolution prohibiting group sales demonstrations in SUNY facilities, such as dormitories. Plaintiffs, ten individuals who at the commencement of this action were students in the SUNY system, contend that that resolution runs afoul of the First Amendment. This case has been proceeding through the federal court system for over ten years; familiarity with the underlying facts and proceedings is presumed. Therefore, only the facts necessary to an understanding of the defendants' motion for reconsideration will be set forth herein.

BACKGROUND

On May 24, 1991, this court held that the present action had been rendered moot because in the intervening years the plaintiff students had graduated. *Fox v. Bd. of Trustees of State Univ. of New York,* 764 F.Supp. 747, 757 (N.D.N.Y.1991) ("*Fox V*"). Despite that holding, the court allowed amendment of the complaint pursuant to Fed.R.Civ.P. 15(a). *Id.* at 758-59. The court did so even though plaintiffs had not formally moved to amend,[1] reasoning that the defendants would not be prejudiced by allowing such an amendment. *Id.* at 758. The court was also concerned (in hindsight perhaps unduly so) with achieving a final resolution of this litigation, involving, as it does, important First Amendment issues with potentially widespread implications.

Shortly thereafter, on June 10, 1991, the defendants moved for modification of the court's May 24, 1991 memorandum-decision and order pursuant to Fed.R.Civ.P. 54(b). Specifically, defendants seek to have this court modify that order to dismiss the complaint altogether on mootness grounds, rather than allowing plaintiffs to amend their complaint to cure that defect. In the alternative, if the court denies that aspct of defendants' motion, the defendants seek to have the court's May 24, 1991 order modified to allow for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[2]

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1. At the time, the court believed that the defendants had also viewed plaintiffs' informal request to amend as a motion for such relief because they seem to have responded to it as such. *Fox V,* 764 F.Supp. at 757, n. 45. The defendants have made it abundantly clear on this motion, however, that the court made an incorrect assumption in that regard. *See* Affidavit of Daniel Smirlock (June 5, 1991) at ¶ 3. Indeed, defense counsel avers that if he had considered that request as a formal motion, he would have fully pointed out "the obvious logical, legal and factual problems with such a motion." *Id.*

2. That stautute provides, in part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order,

Not surprisingly, plaintiffs vigorously oppose this motion. They argue first that there is ample authority for allowing the substitution and/or addition of new plaintiffs in a moot action under either Rule 15 or 21 or both.[3] Plaintiffs next argue that this action is not moot because the original plaintiffs are entitled to nominal damages, regardless of the fact that such damages were not expressly sought in their verified amended complaint.[4] In the event this court reaches the issue of whether an interlocutory appeal should be allowed here, the plaintiffs contend that it should not because the defendants cannot satisfy the statutory requirements for such an appeal under 28 U.S.C. § 1292(b). Finally, the plaintiffs stridently declare that, "[a]s a matter of fair advocacy, one would expect that a party to a lawsuit would refrain from taking such an outlandish position in criticizing its opponent's arguments, let alone an Order of a court. . . ." Plaintiffs' Opposition Memorandum at 27. On that basis, plaintiffs also are seeking Rule 11 sanctions in the form of attorneys' fees and costs in opposing this motion.

As part of their opposition papers, the plaintiffs have submitted a proposed amended complaint naming not only the ten original student plaintiffs who have graduated or moved from SUNY dormitories, but also eight students who, as of June, 1991, were enrolled in the SUNY system. Four of the eight prospective plaintiffs are or were officers in the student

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NOTES *(Continued)*

> if application is made to it within ten days after the entry of the order: . . . .

28 U.S.C. § 1292(b) (West Supp.1993).

3. Notably, Rule 21 did not provide the basis for the court allowing amendment of the complaint in *Fox V.*

4. Since the inception of this lawsuit in December, 1982, plaintiffs have filed three subsequent amended complaints. It is the second amended complaint, filed with the court on January 30, 1986, which was the focus of the court's attention in *Fox V* and which continues to be the focus of the court's attention on this motion. Thus, unless otherise stated, all references herein are to that second amended complaint.

government at SUNY, and some of them were planning to reside in SUNY dormitory housing during the 1991-92 academic year.[5]

In accordance with Local Rule 10(m) for the Northern District of New York, the court did not require oral argument on this motion for reconsideration.

DISCUSSION

The Second Circuit has recognized that " 'the major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.' ' " *DiLaura v. Power Authority of the State of New York*, 982 F.2d 73, 76 (2d Cir.1992) (quoting *Virgin Atl. Airways v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.), *cert. denied*,___ U.S. ___, 113 S.Ct. 67, 121 L.Ed.2d 34 (1992)) (quoting in turn 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure ("Federal Practice") § 4478, at 790 (1981)). Furthermore, subject matter jurisdiction, which is at the heart of defendants' motion herein, is "particularly suited for reconsideration. . . ." *Id.* 982 F.2d at 77 (citation omitted). As will be discussed, upon further reflection, the court is convinced that its May 24, 1991, decision was in clear error, but only insofar as it allowed plaintiffs to amend their complaint to avoid dismissal because of mootness.

[1] In responding to the defendants' motion, plaintiffs first address the propriety of the court's decision allowing plaintiffs to amend their complaint, even though the court found that the action had become moot. Then the plaintiffs go on to dipsute the court's finding that this action had become moot.[6] Obviously if the court agrees with the plaintitfs that it

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5. It cannot be ascertained from the proposed amended complaint, or, for that matter, from any other documentation presently before the court when the prospective plaintiffs will graduate from SUNY, or whether some of them may already have done so. The court assumes, however, that plaintiffs' counsel had the foresight to include in this proposed amended complaint at least one prospective plaintiff who has not yet graduated from SUNY.

6. The court notes in passing that it was the defendants and not the

erred in finding this action moot, then there will be no need to reconsider whether the court should have allowed plaintiffs to amend their complaint to avoid mootness. The court will therefore first address the plaintiffs' argument that they are entitled to nominal damages, and thus their action has not become moot.

I. Nominal Damages

In *Fox V,* while recognizing that "even 'nominal damages' will save a case from mootness," this court nonetheless held that plaintiffs could not avoid the fact that their action had become moot by relying upon a claim for nominal damages, because such claim was not alleged in, or could not even be inferred from, their complaint. *Fox V,* 764 F.Supp. at 756 (footnote omitted). On this motion for reconsideration, plaintiffs continue to insist that the availbility of nominal damages precludes a finding of mootness here. Plaintiffs make several arguments in support of their position, none of which are persuasive.

[2, 3] First plaintiffs assert that the fact that the court in *Fox V* did not read a nominal damages claim into their complaint[7] is inconsistent with the second sentence of Fed.R.Civ.P. 54(c), which states:

NOTES *(Continued)*

plaintiffs who moved for reconsideration of the court's decision in *Fox V;* the plaintiffs did not file a cross-motion for reconsideration. In keeping with the liberal mannner in which the court has overlooked, where possible, procedural irregularities by the parties to this litigation, *see, e.g., Fox V,* 764 F.Supp. at 757, n. 45, it will continue to do so. Therefore, even though the plaintiffs did not expressly move for reconsideration, the court will nonetheless cnsider this argument for reconsideration raised by the plaintiffs.

7. This court in *Fox V* pointed out that plaintiffs' complaint contained only the standard boilerplate "wherefore" clause, seeking "such other relief as the court deems just and proper[.]" *Fox V,* 764 F.Supp. at 756 (footnote omitted).

> Except as to a party against whom a judgment is entered by default, *every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled,* even if the party has not demanded such relief in the party's pleadings.

Fed.R.Civ.P. 54(c) (emphasis added). Plaintiffs are conveniently ignoring the plain language of that rule, however. On its face, that rule applies only where a final judgment is to be entered in the prevailing party's favor. *See Pearson v. Fair,* 935 F.2d 401, 414 (1st Cir.1991). This provision of Rule 54(c) empowers the court to award the prevailing party relief justified by the evidence adduced at trial, even if such relief was not specifically requested in that party's pleading. *See Robinson v. Lorillard Corp.,* 444 F.2d 791, 803 (4th cir.1971).[8] Obviously this lawsuit has not yet reached that point in the litigation and thus plaintiffs' reliance upon this particular provision of Rule 54(c) is wholly misplaced.

Moreover, even though one noted commentator has observed that, "Rule 54(c) has been utilized in a variety of contexts[,]"[9] the court is unaware of any case, and the parties have cited to none, wherein a court allowed Rule 54(c) to be used as a vehicle for reviving an otherwise moot action. Indeed if Rule 54(c) could be used for that purpose, a case would rarely if ever become moot. Clearly that was not the intended purpose of Rule 54(c). Thus, the court is not convinced that Rule 54(c) requires it to retreat from its earlier decision in *Fox V* that plaintiffs' complaint does not contain a claim for nominal damages which would defeat defendants' mootness argument. The court thus declines to expand the already broad scope of Rule 54(c) by employing it in a case where even a cursory reading of the Rule shows that it is impermissible to do so.

[4, 5] Plaintiffs' next argument is equally unavailing. Plaintiffs first state that nominal damages are available in a civil rights action such as the present one, even without a

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8. *See generally* 6 Moore's Federal Practice ¶ 54.62 (2nd ed. 1993); Federal Practice § 1255, at 371 and § 2664, at 146.

9. Federal Practice § 2644, at 156.

showing of actual injury. The court fully agrees. *See Carey v. Piphus,* 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978) (even in the absence of proof of actual injury, an award of nominal damages in the amount of $1.00 would be proper as a means of vindicating one's "absolute" right to procedural due process). Plaintiffs' analysis becomes flawed after that point, however, because of their undue emphasis on the phrase the "availability of nominal damages." *See* Plaintiffs' Opposition Memorandum at 20. Courts have not held, as plaintiffs seem to be suggesting, that the mere **availability** of nominal damages can save a case from becoming moot. Rather, without exception, in the cases relied upon by plaintiffs, as well as in others,[10] the plaintiffs therein were able to avoid dismissal of their actions on mootness grounds because a damage claim was plainly alleged in the complaints.

For example, in *Davis v. Village Park II Realty Co.,* 578 F.2d 461 (2d Cir. 1978), a case referred to by the plaintiffs herein, the Second Circuit expressly stated that, "[t]he availability of either nominal or substantial damages is sufficent to prevent this case from becoming moot." *Id.* at 463 (citing *Powell v. McCormack,* 395 U.S. 486, 495-500, 89 S.Ct. 1944, 1950-52, 23 L.Ed.2d 491 (1969)). Unlike the plaintiffs in this case, however, from the outset the plaintiff in *Davis* had sought damages, costs and attorneys' fees, as well as injunctive and declaratory relief. *See id.* 578 F.2d at 462.

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10. *See, e.g., Ellis v. Broth. of Ry., Airline and S.S. Clerks,* 466 U.S. 435, 442, 104 S.Ct. 1883, 1889, 80 L.Ed.2d 428 (1984) (claim for injunctive relief was rendered moot, but generalized claim in complaint for monetary damages kept the case alive, even though the amount at issue was "undeniably minute"); *McFarlin v. Newport Special School Dist.,* 980 F.2d 1208, 1211 (8th Cir. 1992) (claim for injunctive relief mooted by plaintiff student's graduation, but damages also sought in complaint for deprivation of plaintiff's constitutional rights, thus "[t]he issue of damages continues to present a live controversy which may be litigated in the district court[ ]"); and *McCabe v. Nassau County Medical Center,* 453 F.2d 698, 701-702 (2d Cir. 1971) (in action under 42 U.S.C. § 1983, damage claim not mooted even though plaintiff no longer needed equitable relief, because "[a] properly alleged damage claim was in the case from the start and was not inserted after the complaint was filed in an attempt to breathe life into a moribund dispute,. . . . [,]" and that claim was not nominal in that it was for $250,000).

The same is also true of *Beyah v. Coughlin,* 789 F.2d 986 (2d Cir.1986), another case relied upon by the plaintiffs herein. In *Beyah* an Attica inmate brought an action for alleged constitutional deprivations which occurred while he was imprisoned there. During the course of that litigation, the plaintiff was released from prison. Therefore, on appeal, the defendants sought to sustain the judgment of the lower court dismissing the complaint on the basis of mootness. The Second Circuit gave short shrift to that argument. More specifically, the Court held that although the plaintiff's claim for declaratory and injunctive relief had become moot due to his release from prison, plaintiff's damage claim was not moot "since it is now well established that if he can prove that he was deprived of a constitutionally protected right, and if defendants are not able to establish a defense to that claim, Beyah [the plaintiff] will be entitled to recover at least nominal damages." *Id.* at 989 (citing *Carey, supra*). There is again, however, a crucial distinction between *Beyah* and this case; and that is the fact that in *Beyah,* in his complaint, the plaintiff specifically sought compensatory and punitive damages, in addition to declaratory and injunctive relief. *Id.* at 987. Consequently, there was no need for the Court in either *Davis* or *Beyah* to consider whether a plaintiff can prevent a case from becoming moot based solely upon the availability of nominal damages, where no such damages were sought in the complaint (or, for that matter, where monetary damages were not mentioned at all in the complaint).

Indeed, in *Goichman v. City of Aspen,* 590 F.Supp. 1170 (D.Col.1984), *aff'd on other grounds,* 859 F.2d 1466 (10th Cir.1988), where the court did have occasion to address that issue, it refused to consider the constitutional issue raised by plaintiff simply to determine whether under *Carey, supra,* he was entitled to $1.00 in nominal damages. The court's refusal was based on the fact that the complaint did *not* include a prayer for nominal damages. *Id.* 590 F.Supp. at 1173. The Seventh Circuit reached the same conclusion in *R.S. & V. Co. v. Atlas Van Lines, Inc.,* 917 F.2d 348 (7th Cir.1990). In *Atlas Van Lines,* the Court held, in a breach of contract action, that the issue of whether the contract was terminable at will was moot

because no nominal damages were claimed in the complaint. *Id.* at 348. Thus, in both *Goichman* and *Atlas Van Lines* the courts expressly declined to allow an unstated damage claim to prevent those cases from becoming moot.

[6] Plaintiffs attempt to overcome this pleading deficiency by asserting that they are entitled to nominal damages, despite the fact that they did not seek the same in their amended complaint."[11] Plaintiffs first attempt to cure their defective complaint by claiming that even though they did not mention nominal damages, there is an allegation in the complaint that "[t]he amount in controversy exceeds the sum of $10,000, exclusive of interest and costs."[12] Complaint at 5, ¶ 17. As defendants rightly note, however, plaintiffs are failing to take into account the distinction between a jurisdictional "amount in controversy" and an effort to recover certain kinds of monetary damages in a set amount. What is more important here, though, is the fact that jurisdiction is not predicated upon diversity. Thus that allegation is superfluous, and certainly would not serve to put defendants on notice as to the nature and scope of any potential damage claim against them.

[7] Plaintiffs next rely upon their request in the "wherefore" clause for such "other relief as the Court deems just and proper." *Id.* at 16. Plaintiffs then argue again that nominal damages are "just and proper" in a civil rights action. As previously discussed, however, in contrast to the present action, in those cases where the possibility of recovering nominal damages did prevent a case from becoming moot, a damage claim was specifically alleged in the complaint.[13]

Plaintiffs also once again try to use Rule 54(c) as a means for reading a damage claim into their complaint where none

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11. Significantly, plaintiffs did not assert a claim for monetary damages generally.

12. When this case was originally sued, the diversity statute required only $10,000 as the amount in controversy. 28 U.S.C. § 1332, Commentary on 1988 Revision (West Supp.1993). That changed in 1988 with the enactment of the Judicial Improvements and Access to Justice Act, which, among other things, raised the monetary minimum under subdivisions (a) and (b) of this statute from $10,000 to $50,000.00. *Id.*

13. *See* discussion *infra*, p. 478-79.

exists. As the court has made clear, however, that is not a proper use of Rule 54(c).[14] The Fifth Circuit's decision in *Sapp v. Renfroe,* 511 F.2d 172 (5th Cir.1975), a case heavily relied upon by these plaintiffs, does not convince the court otherwise. At the time that action was commenced, the plaintiff was seeking enrollment in a high school which required all tenth grade male students to successfully complete a course of military instruction, as a condition for completion of tenth grade and to graduate from that high school. The plaintiff refused to enroll in such a course and he was eventually denied admittance to that school. The plaintiff then brought an action alleging that the school board's refusal to allow him to attend that high school violated his right to free speech and freedom of religion. While the *Sapp* case was mending its way through the court system, the plaintiff graduated from another high school.

Following a non-jury trial, the district court rejected plaintiff's constitutional claim. On appeal the Fifth Circuit affirmed but for different reasons. The Court found plaintiff's claim for declaratory relief moot, but it did not find moot plaintiff's claim for monetary damages sustained as a result of tuition expenses incurred at the other high school. *Id.* at 176. The *Sapp* Court did not find that damage claim moot even though plaintiff's complaint did not include a claim for monetary damages, because the plaintiff there had incurred actual damages as a result of tuition expenses he incurred while attending the other high school. The Court noted in passing the applicability of Rule 54(c) to that situation. *Id.* at 176 n. 3.

Despite the remarkable similarity between the complaint in *Sapp* and the complaint at issue herein, particularly with respect to the nature of the relief sought therein,[15] the court does not read *Sapp* as sanctioning the use of Rule 54(c) in a case such as this where no trial has been conducted yet. In contrast to the present case, not only had a trial been conducted in *Sapp,* but evidence had also been proffered establishing that plaintiff had incurred actual compensatory dam-

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14. *See* discussion *infra,* p. 478.

15. As in the present case, plaintiff Sapp's complaint did not contain a claim for monetary damages although it did demand such "further relief as is just and proper." 511 F.2d at 176 n. 3.

ages. Therefore, the *Sapp* Court's reference to Rule 54(c) in that setting was entirely consistent with the language and intent of that Rule. Assuming *arguendo* that plaintiffs' complaint had not been dismissed in *Sapp*, it would have been entirely proper for the district court, under Rule 54(c), to have fashioned a judgment awarding him monetary damages based upon the proof adduced at trial. Given the difference in procedural posture between *Sapp* and this case, this court still must conclude that the plaintiffs herein cannot salvage their otherwise moot case by resorting to Rule 54(c).

[8] There is one final issue pertaining to nominal damages which cannot be overlooked and that is plaintiffs' alternative "request" for leave, yet again, to amend their complaint to specifically state a claim for nominal damages.[16] Plaintiffs' Opposition Memorandum at 23. In their reply, defendants assert, without any discussion, that the doctrine of qualified immunity precludes a recovery of nominal damages here.[17] In *Wilkinson v. Forst,* 832 F.2d 1330 (2d Cir.1987), *cert denied,* 485 U.S. 1034, 108 S.Ct. 1593, 99 L.Ed.2d 907 (1988) the Second Circuit, disagreeing with the district court, held that as to two of the defendants the law was not "so adequately clear and settled as to warrant an award of damages under the rule of *Harlow v. Fitzgerald.*" *Id.* 832 F.2d at 1342. Consequently, the Court reversed a judgment for nominal damages as against

16. The court is compelled to comment, as it has before, that the plaintiffs did not file a cross-notice of motion seeking this relief. Plaintiffs simply buried this request in their opposition memorandum of law. The court does not look favorably upon this practice. Without a notice of motion, both the court and opposing counsel are left to speculate as to the exact nature and scope of relief which a party is seeking. Moreover, without, in this case a notice of cross-motion, defendants were under no obligation to respond to such a request, and they did not. That defendants did not view this "request" as a motion is evident by the fact that they did not address the issue of whether plaintiffs should be allowed to amend their complaint to include a nominal damages claim in their Reply Letter Brief of July 11, 1991. (As the moving party, after first seeking permission from the court, which they did, defendants were entitled to file this reply in connection with their own motion. Northern District of New York Local Rule 10(E)).

17. Defendants' argument also suffers from a procedural irregularity: they failed to allege a qualified immunity defense in their answer.

those defendants. *Id.* Consistent with that holding, more recently, in *Jermosen v. Smith*, 945 F.2d 547 (2d Cir.1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1565, 118 L.Ed.2d 211 (1992), after undertaking a thorough discussion of qualified immunity, the Second Circuit concluded that "none of the defendants violated established rights of which a reasonable officer would have known." *Id.* 945 F.2d at 552. The Court therefore reversed the judgment of the district court and vacated the award of nominal damages and attorney's fees. *Id.*

[9] Even though neither plaintiffs' request to amend their complaint nor defendants' qualified immunity defense are properly before the court, to be thorough, the court will at least comment upon these issues. Without engaging in an extensive discussion of qualified immunity, the court opines that, assuming *arguendo* that defendants had properly asserted a qualified immunity defense, in all likelihood, they would be entitled to such immunity insofar as a purported claim for nominal damages is concerned. The court bases that opinion on its observation that this protracted litigation has resulted in numerous written decision, including one by the Second Circuit[18] and one by the Supreme Court,[19] all focusing, for the most part, upon the extent and nature of plaintiffs' First Amendment rights, if any, and, as the parties are painfully aware, that issue is still unresolved. From the history of this litigation itself, it should be evident that plaintiffs did not have a "clearly established" right to conduct group demonstrations for housewares in their dormitory rooms at the time the events complained of occurred. *See Jermosen*, 945 F.2d at 550 (quoting *Natate v. Town of Ridgefield*, 927 F.2d 101, 104 (2d Cir.1991) (quoting in turn *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)) (" 'A government official performing a discretionary function is entitled to qualified immunity provided his or her 'conduct does not violate clearly established rights of which a reasonable person would have known.' "). Thus, without necessarily deciding the

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18. *Fox v. Bd. of Trustees of State Univ. of New York*, 841 F.2d 1207 (2d Cir.1988).

19. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

issue, it appears to the court that the constitutional rights asserted by plaintiffs were not clearly established at the time of the alleged violation. Consequently, assuming that defendants had properly raised a qualified immunity defense, in any event, plaintiffs would in all probability be precluded from recovering nominal damages from these defendants. Any request to amend the complaint to include such a claim would therefore be futile and so not proper. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962) (leave to amend under Rule 15(a) should not be granted where amendment would be futile).

To summarize, plaintiffs have simply failed to convince the court that its finding in *Fox V* that a nominal damage claim could not be read into the complaint, so as to salvage plaintiffs' case from mootness, was in clear error. Consequently, the court adheres to its earlier decision in *Fox V* with respect to mootness and nominal damages.

II. Leave to Amend the Complaint

The thrust of defendants' motion for reconsideration is that the court in *Fox V* improperly allowed plaintiffs to amend their complaint to substitute as plaintiffs students who were currently enrolled at SUNY. More specifically, the defendants contend that "[a] moot case cannot be revived by substituting new plaintiffs with a personal stake in the litigation." Defendants' Memorandum at 2. In essence, plaintiffs respond that such an amendment is entirely proper under existing case law.[20]

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20. In their proposed amended complaint, plaintiffs added a number of new student plaintiffs to the original group of plaintiffs, as opposed to substituting, and that was in conformity with the court's directive in *Fox V. See* 764 F.Supp. at 759. However, given the fact that the court has already found that the original plaintiffs no longer have the requisite personal stake in this lawsuit, what the plaintiffs are in fact attempting to do, or should be attempting to do, is to substitute student plaintiffs who are currently residing in SUNY dormitories for those who no longer are. Indeed, it appears as though plaintiffs also view this as a substitution because many of their arguments are couched in terms of wholesale substitution and dropping parties, rather than focusing on the addition of plaintiffs.

[10] There is a long unbroken line of cases holding that, generally, if a case has become moot while on appeal, the defendant is entitled to dismissal as a matter of right.[21] There can be no doubt as to the continuing vitality of that line of cases after the Second Circuit's decision in *New York City Employees Retirement System v. Dole Food Co.*, 969 F.2d 1430 (2d Cir.1992). In *Dole Food* the Second Circuit reiterated the general proposition requiring dismissal when a case becomes moot, explaining:

> A case becomes moot 'when the issues presented are no longer "live" or the parties "lack a legally cognizable interest in the outcome" ' (quoting *Blackwelder v. Safnauer,* 866 F.2d 548, 551 (2d Cir.1989)); (citations omitted). When this occurs, the Constitution's case or controversy requirement, U.S. Const. Art. III, § 2, is not satisfied and a federal court lacks subject matter jurisdiction over the action. (citations omitted). *A moot action therefore must be dismissed,* even if the case was live at the outset but later events rendered it moot on appeal. (citation omitted). 'When a civil case becomes moot on appeal from a federal district court, the appropriate disposition is to dismiss the appeal, reverse or vacate the district court judgment, and remand the case to the district court with instructions to dismiss the complaint.' (quoting *Blackwelder,* 866 F.2d at 550) (citations omitted).

Id. 969 F.2d at 1433 (emphasis added). Similarly, in *In re Chateaugay Corporation,* 988 F.2d 322 (2d Cir.1993), the Second Circuit again stated that:

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21. *See, e.g., Western Sugar Co. v. Nelson,* 442 U.S. 92, 93-94, 99 S.Ct. 2149-50, 60 L.Ed.2d 735 (1979); *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950) (as cases cited therein at n. 2); *Duke Power Co. v. Greenwood Country,* 299 U.S. 259, 267, 57 S.Ct. 202, 205, 81 L.Ed. 178 (1936); *see also United States v. W.T. Grant Co.,* 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); *Penquin Books USA, Inc. v. Walsh,* 929 F.2d 69, 72-73 (2d Cir.1991); *Hart v. Community School Bd. of Education,* 512 F.2d 37, 56 (2d Cir.1975) (citations omitted).

> The duty of an Article III court is to decide live controversies, 'not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' . . . Accordingly, when, during the pendency of an appeal, events occur that would prevent the appellate court from fashioning effective relief, the appeal should be dismissed as moot. . . .

Id. at 325 (quoting *Mills v. Green,* 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895)) (other citations omitted).

Finally, very recently the Second Circuit again reaffirmed those principles in *Cook v. Colgate University,* 992 F.2d 17 (2d Cir. 1993). The Court in *Cook* vacated the judgment of the lower court and remanded with instructions to dismiss as moot because the plaintiff student athletes, who were challenging Colgate's failure to provide a comparable ice hockey program to men and women, will graduate before the commencement of the 1993-94 academic year, and the ice hockey season at Colgate has ended for this academic year. *Id.* at 20. In reaching that conclusion, the Court reasoned:

> None of the plaintiffs can benefit from an order requiring equal athletic opportunities for women ice hockey players. The only two plaintiffs with arguable standing are Thayer Jaques and Julie Wolff, both presently seniors at Colgate. However, the district court's order requiring Colgate to upgrade the status of its women's club ice hockey team does not take effect until the 1993-94 academic year. Because Jaques and Wolff will have graduated by then, nothing that we decide could affect their rights vis-a-vis Colgate.

Id. at 19 (citations omitted). Thus, despite the existence of significant issues pertaining to the status of women's collegiate sports, the case is moot, and will shortly be dismissed, if it is not already been dismissed.

[11] While the cases referenced above all became moot on appeal, as opposed to becoming moot on remand (which is the situation here), that distinction does not render them inap-

plicable. It is of little consequence at what point during the litigation an action becomes moot. What is important is that when an action becomes moot, it no longer presents a live case or controversy, and thus, in accordance with the law set forth above, a federal court must dismiss that case because it lacks subject matter jurisdiction to entertain it. And, try as they might, that is precisely the situation in which the plaintiffs herein find themselves. As in *Cook*, none of the original plaintiffs could possibly benefit from an order allowing them to conduct and/or attend group sales demonstrations in *SUNY* dormitories.[22]

[12] Given the unequivocal language of *Dole Food*, as well as the case law just recited, this court is left with little, indeed no, leeway. The court has already expressly determined that this action is moot and that none of the exceptions to mootness apply to this case, *Fox V*, 764 F.Supp. at 752-757; and the court remains convinced of that. Thus, the defendants are right: the court must dismiss this lawsuit. While in the court's view, that result is regrettable given the fact that the important First Amendment issues raised by this action have been vigorously litigated by these parties for many years, and the parties, as well as the court, have received the benefit of the Supreme Court's instruction, nonetheless, the court is left with no other alternative. As the Supreme Court aptly stated in *Munsingwear, supra*, "[i]f there is hardship in this case, it was preventable." 340 U.S. at 39, 71 S.Ct. at 106. The same is true here. At the outset, the plaintiffs could have moved for class certification pursuant to Fed.R.Civ. 23; in that way, they could have avoided this now seemingly harsh but unavoidable result—dismissal of a lawsuit which they have pursued for years.[23]

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22. Incidentally, to put this controversy in some perspective in terms of a time frame, there is only one specific incident alleged in the complaint where a plaintiff was enrolled at SUNY at the time he was denied permission to host such an event, and that was in November, 1982. Complaint at ¶ 37.

23. The court candidly admits that from the outset it has never understood the seeming reluctance by plaintiffs' counsel to seek class certification. A controversy such as this, involving as it does a group of students, begs for class certification. However, plaintiffs have amended their complaint a total

Plaintiffs ignore the well-established precedent requiring dismissal of a case which becomes moot during the course of the litigation, and instead assert that the court correctly allowed them to amend their complaint, even though this action had become moot. Plaintiffs rely upon two separate but somewhat related[24] Rules as sources for the court's authority to allow them to amend their complaint—Rule 15 and Rule 21. Regardless of which Rule the plaintiffs urge, however, amendment simply cannot be allowed under the circumstances of this case.

Although not relied upon by the court in *Fox V,* the plaintiffs submit that Rule 21 could provide a basis for allowing amendment of the complaint here. Rule 21 states in full:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party of its own initiative at any stage of the action and on such terms as are just.

Fed.R.Civ.P. 21. Several courts have recognized the impropriety of relying upon Rule 21 to substitute parties, as opposed to adding or dropping parties.[25] The Third Circuit's holding in *Field v. Volkswagenwerk AG,* 626 F.2d 293 (3rd Cir.1980), is illustrative in this regard. The *Field* Court refused to allow a non-diverse plaintiff to use Rule 21 as a vehicle for substituting a diverse plaintiff, reasoning:

> this rule [21] authorizes a court to drop or add misjoined or nonjoined parties at any stage of any action on such terms as are just. But again, what the appellants endeavor to accomplish here is not to drop a misjoined party or to

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NOTES *(Continued)*

of three times, excluding the amendment directed by the court in *Fox V,* yet not one of those times did they seek class certification.

24. *See generally* Federal Practice at § 1479, at 569-573 (discussing relationship between Rule 15(a) and other Federal Rules).

25. *See, e.g., Sable Communications of California v. Pacific Tel. & Tel. Co.,* 890 F.2d 184, 191 n. 13 (9th Cir.1989) ("Nothing on the face of Rule 21 allows substitution of parties. The rule by its terms creates means to cure '[m]isjoinder of parties.' ")

> add a nonjoined party, but to substitute a diverse claimant for a non-diverse plaintiff. This kind of practice is simply not within the scope of Rule 21, which is not a rule providing for the substitution of parties . . . Rule 21 was enacted to minimize the harsh effects of common-law adherence to technical rules of joinder. . . . It was not adopted, as Judge Lombard has stated for the Court of Appeals for the Second Circuit, 'in order to deal with problems of defective federal jurisdiction.'

Id. at 306 (quoting *Kerr v. Compagnie De Ultramar,* 250 F.2d 860, 864 (2d Cir.1958)) (other citations omitted).[26]

[13] By the same token, in this court's view, Rule 21 was also not enacted as a means for a party to avoid dismissal on mootness grounds. If that were so, no case would ever become moot because a party who no longer had the requisite personal stake in the litigation, so as to satisfy the case or controversy requirement of Article III, would only have to move under Rule 21 for substitution of a party who could satisfy that requirement. That was not the purpose underlying the adoption of Rule 21.[27]

[14] Having said that, the court cannot ignore the fact that case support does exist, as plaintiffs noted, for permitting substitution of parties under Rule 21. Even a cursory reading of those cases demonstrates, however, that they do not support allowing these plaintiffs to amend their complaint because the circumstances giving rise to substitution therein were markedly different from those extant here. For instance, in *Mullaney v. Anderson,* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), the Supreme Court allowed the real party in interest to be substituted for his agent, acknowledging that "Rule 21 will rarely come into play at this stage of the litigation." *Id.*

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26. *See also Schwartz v. Metropolitan Life Ins. Co.,* 2 F.R.D. 167, 168 (D.Mass.1941) (Rule 21 "contemplates the retention of a party or parties after the other party or parties are dropped or before they are added[;]" thus, the guardian suing as representative of insane ward was not allowed to institute a personal action against defendant by substitution.)

27. *See generally* Federal Practice § 1681, at 441 (footnote omitted) (Rule 21 "provides the courts with a valuable procedural device that can be used to avoid multiple litigation and to promote liberal joinder of parties.").

at 417, 72 S.Ct. at 430. The Court further acknowledged that it granted that motion because of the "special circumstances" presented therein. *Id.*

Rogers v. Paul, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265 (1965), a school desegregation case, is also readily distinguishable.[28] In *Rogers,* even though one of the student plaintiffs had graduated and the other had entered his final year of high school during the course of the litigation, the Supreme Court granted a motion to add two additional students as plaintiffs. The students who were added, however, were already members of the class represented. *Id.* at 199, 86 S.Ct. at 359. The distinction between *Rogers* and this case could not be more clear: no class was ever certified here. So, it is not a matter, as it was in *Rogers,* of merely adding members to an already certified class.

Finally, the court also does not find persuasive in this setting the Supreme Court's decision in *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989), wherein the Court held that, *inter alia,* a Court of Appeals has authority under Rule 21 to dismiss a dispensable nondiverse party. *Id.* at 836, 109 S.Ct. at 2225. In *Neuman-Green,* but for the presence of the dispensable, non-diverse party, there was a live case or controversy before the court. It was not a matter there of the Court reviving, based upon Rule 21, a no longer live controversy. Given the Supreme Court's own recognition that the issue presented in *Newman-Green* was a "narrow" one, *id.* at 832, 109 S.Ct. at 2223, coupled with the fact that that issue is entirely different from the issue presented by the this motion, it is difficult to see the relevance of *Newman-Green* to this case.

A couple of other cases upon which plaintiffs rely are more closely analogous to the present case, and thus warrant closer consideration by the court. After carefully reading those cases several things become clear, however. The first is that the plaintiffs have selectively read those cases, citing to the court language which is admittedly favorable to their posi-

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28. The Court in *Rogers* did not recite a particular rule or other statutory basis for its decision to allow the addition of plaintiffs there.

tion on this motion, but failing to take into account the subtle but important differences between those cases and the present one. A second and equally important fact, which is apparent after scrutinizing those cases, is that the scope of permissible substitution thereunder is extremely limited; and that is something which plaintiffs also disregard. Consequently, even cases which at first glance tend to bolster plaintiffs' assertion that the court in *Fox V* properly allowed them to amend their complaint, still cannot aid plaintiffs in their struggle to overcome the fact that their case has become moot.

One of the cases which plaintiffs contend supports allowing them to amend their complaint is *Hackner v. Guaranty Trust Co.*, 117 F.2d 95 (2d Cir.), *cert. denied,* 313 U.S. 559, 61 S.Ct. 835, 85 L.Ed. 1520 (1941). The Second Circuit in *Hackner* allowed a new plaintiff, with a claim that would satisfy the jurisdictional amount, to be substituted by amendment, although none of the original plaintiffs had claims within the jurisdictional amount. The Court observed that by so doing, the delay and expense of a new lawsuit could be avoided. Closer examination of *Hackner* reveals, however, that there are critical distinctions between that case and the present one which renders it inapposite. The Fifth Circuit in *Summit Office Park v. United States Steel Corp.*, 639 F.2d 1278 (5th Cir.1981), accurately set forth the relevant and somewhat unique facts of *Hackner* as follows:

> [A]ll the named plaintiffs in *Hackner,* including the new plaintiff, had claims identical in substance. . . . The claims dfffered only in the jurisdictional amount sought for their individual injuries. Neither the *class* nor the cause of action was changed in the amended complaint. The original plaintiffs had valid claims, which, *as members of the class* they originally proposed, they could still recover upon in the new complaint. Therefore, in *Hackner,* both the original named plaintiffs and [the] *class* they represented continued to have a stake in the outcome of the same controversy.

Id. 639 F.2d at 1283 n. 12 (citation omitted) (emphasis added).

The differences between *Hackner* and this case are patently obvious. From the outset, *Hackner* was a class action, whereas the plaintiffs in this case have never sought class certification. Likewise, in this case, unlike *Hackner,* the original plaintiffs do not continue to have any personal stake in the outcome of this litigation. *See id.* Therefore, because of the numerous significant factual distinctions between *Hackner* and the present case, the court does not find that *Hackner* supports permitting these plaintiffs to amend their complaint to substitute students who supposedly are currently residing in SUNY dormitories, for those who no longer reside there.

National Maritime Union of America v. Curran, 87 F.Supp. 423 (S.D.N.Y.1949), also deserves close examination by the court. Based upon *Hackner,* in *National Maritime,* the court found that it did have the power to grant substitution of new plaintiffs to satisfy diversity requirements. *Id.* 87 F.Supp. at 426. After making such a finding, the court went on to discuss at length situations where substitution should be allowed other than under Rule 25—the rule applicable on its face to substitution.[29] The court in *National Maritime* enumerated three categories in which substitution may be allowed: (1) "where the same person is the party both before and after substitution, but desires to change the capacity in which he is bringing the action[;]" (2) where the United States government has taken over an action as the real party in interest; and (3) where a mistake has been made as to the person entitled to bring the suit. *Id.* at 426. The court pointed out that in cases which fell into one of those three categories, there were "extenuating circumstances" justifying deviation from the general rules regarding substitution of parties. *Id.* The court refused to allow an amendment to substitute in *National Maritime,* though, because the facts of that case did not fall into any of those three categories. Likewise, because the facts of this case do not present extenuating circumstances even remotely analogous to those articulated in *National Maritime,*

29. Basically, that rule designates four specific categories where substitution is appropriate: (1) death; (2) incompetency; (3) transfer of interest; and (4) public officers—death or separation from office. Fed.R.Civ.P. 25.

the court is not persuaded that *National Maritime* provides a basis for allowing these plaintiffs to amend their complaint.

[15] In conclusion, although authority does exist for allowing substitution of parties under Rule 21, the court declines to do so under the circumstances presented herein. In the court's opinion, Rule 21 cannot be employed as a means to create a case or controversy through substitution where one no longer exists. If that were a proper application of Rule 21, then paities could routinely invoke Rule 21 as a means of circumventing a finding of mootness, thus rendering the mootness doctrine a legal fiction.

[16] Next the court will explore whether, as plaintiffs urge, Rule 15(a) provides justification for allowing amendment of the complaint in this case. Rule 15(a) provides that "leave to amend shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Relying primarily upon the liberal spirit of that rule, the court allowed plaintiffs to amend their complaint to add new plaintiffs, even after a finding of mootness. In hindsight, the court was admittedly overzealous in its effort to assure that this case not be dismissed because of procedural deficiencies. Plaintiffs cite a host of cases which they claim support the conclusion that the court properly allowed amendment under Rule 15. *See e.g.,* Plaintiffs' Opposition Memorandum at 2, n. 3, 4 and 5. Those cases are all factually distinguishable, however; and, of even more import is the fact that in not one of those cases were the plaintiffs allowed to amend their complaint after the court had determined that the action had become moot.

The court will not analyze each of the numerous cases cited by the plaintiffs, but even a quick perusal of just a few of them demonstrates that plaintiffs' reliance thereon is unfounded. The court readily concedes that it is perplexed by plaintiffs' reliance upon a couple of cases, which on their face are so strikingly dissimilar to the present one. First, noting that it was contrary to its usual practice to do so, the Supreme Court in *Diffenderfer v. Central Baptist Church,* 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972), did allow appellants on remand to amend their complaint even though the case had become moot on appeal. *Diffenderfer* had become moot, how-

ever, due to the fact that the statute which was being challenged by the plaintiffs was repealed, and during the course of the litigation, new legislation was enacted to take its place. Thus, *Diffenderfer* involved not a change in parties, which is what plaintiffs are seeking in this case, but rather it involved a change in the legislation being challenged by the same original plaintiffs.

Bender v. Williamsport Area School District, 741 F.2d 538 (3rd Cir.1984), *vacated on other grounds,* 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986), is another case cited by plaintiffs which has absolutely no bearing on this action. There the Court specifically found that the issue presented was capable of repetition, yet evaded review, and thus an amendment was allowed. *Id.* 741 F.2d at 542 n. 4. This court in *Fox V* already considered and rejected that exception to the mootness doctrine. *Fox V,* 764 F.Supp. at 752-53. Therefore, *Bender* is completely irrelevant and hence carries no weight with this court.

Not all of the cases cited by plaintiffs are so plainly inapplicable, however. One case reviewed by plaintffffs merits some discussion because it is factually similar to the present case, and that is *Graves v. Walton County Bd. of Education,* 686 F.2d 1135 (5th Cir.1982), another desegregation case. The district court in *Graves* did allow the substitution of additional plaintiffs for the original named plaintiffs whose claims had become moot. *Id.* at 1136. The Fifth Circuit affirmed this aspect of the lower court's decision finding that the case was a class action, and had been "specifically described and treated as such by the parties and the trial court[,]" even though no formal certification order had been entered. *Id.* at 1138-40. And, therefore, in the Court's view, substitution of plaintiffs to keep the action alive was entirely proper. *Id.* at 1138. Once again, the distinction between *Graves* and this case is indisputable—*Graves* had been filed as a class action and treated as such by all concerned from the inception. That was not done here. Thus, as the foregoing makes clear, plaintiffs have been unable to provide the court with any relevant and persuasive case law which would support permitting an amendment here.

[17] Moreover, there is a procedural hurdle to allowing an amendment, which plaintiffs cannot surmount. In particular, by its terms Rule 15(a) allows only a "party" to amend "the party's pleading." Fed.R.Civ.P. 15(a). In the present case, however, the original plaintiffs are no longer "parties" to this action because the case has become moot as to them. Thus, by its terms, Rule 15(a) does not appear to support allowing the original plaintiffs to amend their complaint **after** a finding of mootness.[30]

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30. Given the liberal manner in which the Second Circuit has allowed the amendment of complaints in arguably analogous circumstances, the court is compelled to offer a few observations at this point. The court is well aware that, at least in this Circuit, if a complaint is dismissed for failure to state a cause of action due to a jurisdictional defect, then that dismissal should be without prejudice to replead so as to cure the defect. *See Cushing v. Moore,* 970 F.2d 1103, 1110 (2d Cir.1992) (citing *Frasier v. General Electric Co.,* 930 F.2d 1004, 1008-09 (2d Cir.1991)). These plaintiffs are not entitled to rely upon the liberal amendment principles espoused in *Cushing* and *Frasier,* however, because this case is now moot. There is a distinct difference, however between allowing a plaintiff to amend his or her complaint to cure a failure to properly allege jurisdiction and allowing a plaintiff who no longer has a personal stake in the outcome of the controversy to amend a complaint to revive an otherwise dead or moot action. In cases such as *Cushing* and *Frasier,* jurisdiction did exist, but it just was not properly pled, whereas when a case becomes moot, as it has here, by definition, the court lacks jurisdiction and hence it is without power to act. *See Pressroom Unions, Etc. Fund v. Continental Assur. Co.,* 700 F.2d 889, 893 (2d Cir.), *cert. denied,* 464 U.S. 845, 104 S.Ct. 148, 78 L.Ed.2d 138 (1983) (footnote omitted) (upholding district court's denial of leave to amend, albeit under 28 U.S.C. § 1653 because the original plaintiff sought "not to remedy inadequate jurisdictional allegations, but rather to substitute a new action over which there is jurisdiction for one where it did not exist."); *see also Jaffree v. Wallace,* 837 F.2d 1461 (11th Cir.1988) (quoting *Summit Office Park, supra,* 639 F.2d at 1282) (plaintiffs could not amend their complaint to surmount an otherwise fatal *res judicata* bar because " '[n]o amendment could give [plaintiffs] a cause of action.' "); *Aetna Cas. & Sur. Co. v. Hillman,* 796 F.2d 770, 774 (5th Cir.1986) (court refused to allow a nondiverse plaintiff to amend to substitute as a new plaintiff a diverse entity, because there was no longer a suit once the nondiverse plaintiff withdrew; and replacing the diverse entity necessarily created a new lawsuit). Thus, in the present case, even if the original plaintiffs could be considered parties for purposes of Rule 15(a), the court could not entertain their motion to amend because it would lack the power to do so.

That conclusion is supported at least implicitly by *Summit Office Park,* a case mentioned earlier.[31] The court is compelled to address that case in some detail because it was the focus of much discussion by the parties to this lawsuit. In *Summit Office Park,* the plaintiff, an indirect purchaser of steel materials commenced an antitrust action, individually and on behalf of a putative class of indirect purchasers against the original seller. During the pendency of that action, the Supreme Court held in another case that only direct purchasers have a cause of action under the antitrust laws. Soon after that, the defendants moved for summary judgment. One day before the district court was to render its decision, plaintiffs "attempted to file an "amended complaint" on behalf of a restructured class limited only to direct purchasers." 639 F.2d at 1281. The proposed amended complaint also changed the cause of action in an effort to conform to the legal principles enunciated in the Supreme Court's intervening decision. As to that proposed amended complaint, in the words of the Fifth Circuit:

> [t]he [district] court held that the Federal Rules of Civil Procedure do not contemplate the use of the amendment process in this manner. The court likened this attempt to amend the complaint to the procedural posture of a lawsuit in search of a sponsor. It noted that the cause of action and original named plaintiff had been dismissed, and that no named plaintiff or certified class member remained with any further stake in the outcome of the litigation. Continuing, the district judge stated, 'such a 'revolving door' theory of representation through the imaginative use of the amendment process . . . would vest in plaintiffs counsel a power and control over litigation, particularly class action litigation, heretofore not recognized by the federal courts.'

Id. The district court went on to "[o]bserve[ ] that no one with a valid claim remained to urge the amendment and that any

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31. *See supra,* p. 485.

litigation on behalf of direct purchasers should be filed in a new lawsuit." *Id.* (footnote omitted).

On appeal the individual plaintiff and the new proposed plaintiff asserted that they had a right to amend the complaint as a matter of course. They alternatively argued that the district court abused its discretion in denying leave to file the amended complaint. The Fifth Circuit rejected both of those arguments and affirmed holding "only that where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action." *Id.* at 1282.

The plaintiffs herein strongly argue that *Summit Office Park* is inapposite because in their view the holding in that case was limited to the situation where the original plaintiff never had a cause of action. Plaintiffs assert, by contrast, that "the original student plaintffs in this action did state a cause of action, and the new student plaintiffs will be merely continuing the same cause of action." Plaintiffs' Opposition Memorandum at 14. The court agrees with plaintiffs that the holding in *Summit Office Park* does seem to be confined to the "unique" facts therein. *Id.* at 1282. In the court's opinion, however, the rationale of that case applies with equal force here. Under the case law previously outlined, once the court in *Fox V* found that the case had become moot, it should have dismissed the case outright. As in *Summit Office Park*, the original plaintffffs should not be allowed to circumvent the well settled principles requiring dismissal under these circumstances by creative use of Rule 15(a). This court, too, cannot countenance the "revolving door theory of representation" advanced by these plaintiffs.

A final consideration in deciding whether an amendment under Rule 15(a) should be granted is whether "justice so requires[,]" which is arguably just another way of viewing the prejudice factor. Fed.R.Civ.P. 15(a). For the same reasons so well put by the Court in *Summit Office Park*, justice would not be served if the plaintffffs in this action were allowed to amend their complaint at this point in the litigation. Justice does not

require that the original plaintfffs be allowed to amend because their case is now moot and, as the defendants correctly noted, "their stake in the litigation is at most academic." Defendants' Memorandum at 6. Furthermore, justice does not require an amendment insofar as the proposed plaintiffs are concerned because they can file an entirely new action should they so choose. Lastly, justice does not require an amendment from the defendants' standpoint because:

> [e]ven if an amended complaint were permissible, it would substantially prejudice defendants by requiring an extensive new round of discovery. In the 4½ years [now almost 6½ years] since this case was tried, there has been a nearly-complete turnover in the administration of SUNY as a whole, and significant turnover as well in the administration of many SUNY campuses, including those at which the former and proposed plaintiffs were students. There is no indication of how these new administrators interpret the regulation at issue.

Smirlock Affidavit at ¶ 5. Thus, if the court were to allow amendment of plaintiffs' complaint herein, it would not be consistent with the mandate of Rule 15(a) that "leave shall be freely given when justice so requires."

Finally, the court cannot examine the effect of allowing an amendment under Rule 15(a) in a vacuum; it must consider the ramifications as they relate to Rule 23, which details the circumstances under which class certification is appropriate. Allowing the plaintiffs to amend their complaint at this late stage in the litigation would, among other things, substantially undermine Rule 23. That is, if courts were to routinely allow amendments in a situation such as this, the incentive for seeking class certification under Rule 23 would be greatly diminished; indeed the whole purpose for the class action mechanism would be undermined.

Having determined that the defendants are correct and that this action must be dismissed, there is no need to consider defendants' alternative argument that the court should certify an interlocutory appeal in this case. Nor is their any need for the court to address plaintiffs' motion for sanctions.

In conclusion, while the court is sympathetic to plaintiffs' plight, in that they and their counsel have undoubtedly invested a tremendous amount of time and resources in this litigation over the years, nevertheless, this case must be dismissed as moot. Therefore, the defendants' are entitled to the primary relief which they seek on this motion for reconsideration. In particular, the court hereby modifies its memorandum-decision and order of May 24, 1991, and hereby ORDERS that that portion of the May 24, 1991 order which permitted plaintiffs to amend their complaint pursuant to Rule 15(a) be deleted; and it is further ORDERED that the complaint be and is hereby dismissed. It is further ordered that plaintiffs' motion for sanctions (albeit in the form of a request, rather than by formal notice of motion) pursuant to Fed.R.Civ.P. 11 is DENIED.

IT IS SO ORDERED.

Todd FOX, Edward R. Detweiler, Stephanie Vaiano, James B. Cullen, Christine Marie Odell, Steven Gawley, Daniel Altman, Philip Jay Botwinik, Jeffrey S. Zellan and Jaclyn Bernstein, Plaintiffs,

v.

The BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and Clifton R. Wharton, Jr., Individually and as Chancellor of the Board of Trustees and the State University of New York College at Cortland, and James M. Clark, Individually and as President of the College at Cortland, and the State University at Binghamton, and Clifford D. Clark, Individually and as President of the State University of New York at Binghamton, and Vincent O'Leary, Individually and as President of the State University of New York at Albany, and the State University of New York College of Arts and Sciences at Potsdam, and Humphrey Tomkin, Individually and as President of the College of Arts and Sciences at Potsdam, Defendants.

No. 82-CV-1363.

United States District Court,
N.D. New York.

May 24, 1991.

Corporation and university students brought action seeking declaratory and injunctive relief against Board of Trustees of state university system, alleging that university violated First Amendment by refusing to permit corporation to conduct product demonstrations in campus dormitory rooms. The United States District Court for the Northern District of New York, 649 F.Supp. 1393, granted relief in part. Appeal was taken. The Court of Appeals, 841 F.2d 1207, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Scalia, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388, reversed and remanded. On remand, the District Court, McCurn, Chief Judge, held that, because students were no longer university or dormitory residents, their action would be moot unless current students were added as plaintiffs.

Ordered accordingly.

Case may be dismissed as moot, even if it technically satisfies Article III case or controversy requirement, if controversy is so attenuated that considerations of prudence and comity for coordinate branches of government counsel court to stay its hand and to withhold relief it has power to grant. U.S.C.A. Const. Art. 3, § 1 et seq.

Capable of repetition yet evading review doctrine is limited to situation in which challenged action is too short to be fully litigated prior to its cessation or expiration and there is reasonable expectation that same complaining party will be subjected again to same action.

University's resolution generally prohibiting private commercial enterprises from operating on university campuses was not sort of action which, by reason of inherently short nature of opportunity for remedy, was likely to evade review, even though litigation had been so lengthy that students were unable to have merits of law suit resolved within four-year student typically remained enrolled at university.

Pleadings did not demonstrate that students brought action on behalf of themselves and all other similarly situated, that any particular student association was named as plaintiff, or that students intended to have class certified, and, thus, students who were no longer university or dormitory residents failed to show that their action bringing First Amendment challenge against university resolution generally prohibiting authorization to private commercial enterprises to operate on university campuses was not moot. U.S.C.A. Const.Amend. 1.

Students' overbreadth challenge to university resolution generally prohibiting commercial enterprises from operating on university campus related solely to application of resolution to particular student plaintiffs, and, thus, overbreadth challenge did not defeat apparent mootness problem which occurred when students were no longer residents at university or dormitory. U.S.C.A. Const.Amend. 1.

Fact that students challenging university resolution prohibiting commercial enterprises from operating on university campus sought attorney fees and costs did not prevent their claim for declaratory relief from becoming moot once students were no longer dormitory or university residents.

Because former students were no longer university or dormitory residents, their First Amendment challenge to university resolution generally prohibiting private commercial enterprises from operating on university campuses or facilities became moot, absent amendment to add current students as plaintiffs. U.S.C.A. Const. Amend. 1.

8. Federal Civil Procedure 824

Mere delay alone does not suffice as basis for denying right to amend pleadings.

Allowing students to amend complaint bringing First Amendment challenge to university resolution prohibiting commercial enterprises from operating on campus would not unduly prejudice university. U.S.C.A. Const.Amend. 1.

Duane Morris & Heckscher, Philadelphia, Pa. (Henry T. Reath, Wayne A. Mack, Jr., Richard W. Riley, of counsel), for plaintiffs.

Robert Abrams, Atty. Gen. of the State of N.Y., Albany, N.Y. (O. Peter Sherwood, Sol. Gen., Peter H. Schiff, Deputy Sol. Gen., Lawrence L. Doolittle, Daniel Smirlock, Asst. Attys. Gen., of counsel), for defendants.

MEMORANDUM—DECISION
AND ORDER

McCURN, Chief Judge.

After a protracted course of litigation, including review by the Supreme Court of the United States, this case is before the court for the fourth time. The court assumes familiarity with this case and will summarize only those facts and proceedings necessary to an understanding of the issues raised on this remand.

In 1982 American Future Systems, Inc. ("AFS")[1] and a student at the State University of New York at Cortland ("SUNY" or "the University")[2] commenced the present

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1. AFS is a corporation engaged in selling cookware, china, crystal, and silverware to college students through group demonstrations.

2. Todd Fox, a SUNY student, was denied permission to host an AFS sponsored cookware demonstration.

action challenging the constitutionality of SUNY Resolution No. 66-156 ("the Resolution"). The Resolution reads as follows:

> No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.

Claiming, *inter alia,* that the Resolution interfered with their first amendment free speech rights, plaintiffs sought a preliminary injunction permitting AFS to conduct group demonstrations in plaintiffs' dormitory rooms without interference.

This action first came before the court on plaintiffs' motion for a preliminary injunction. After making the initial determination that plaintiffs' activities constituted commercial speech, the court then engaged in the four-step analysis enunciated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Com. of New York,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).[3] This court first found that the conduct of AFS was lawful and not misleading.[4] The court went on to find that the interests defined by the University in "(1) preventing disruption; (2) protecting the safety and security of the students; (3) and protecting students from commercial exploitation . . ." were substantial.[5] The court concluded, though, that the Resolution did not satisfy the final

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3. In *Central Hudson* the Supreme Court articulated several factors which courts must examine when considering the constitutionality of government regulation of commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 567, 100 S.Ct. at 2351, 65 L.Ed.2d 341.

4. *American Future Systems v. State University of New York College,* 565 F.Supp. 754, 763-64 (N.D.N.Y.1983) (*"AFS v. SUNY"*).

5. *Id.* at 764-65.

two requirements of *Central Hudson,* in that it did not directly advance the governmental interests asserted, and it was more extensive than necessary, to serve those interests.[6] In reaching that conclusion, the court remarked, "[t]here appears to be only an indirect link between the restriction of commercial speech. . .," and the University's interests allegedly advanced by enforcement of the Resolution .[7]

In light of the foregoing, the court granted preliminary relief to plaintiffs. SUNY—Cortland then promulgated "interim" regulations, and the complaint was amended to include a challenge to those regulations as well.[8] Following a non-jury trial, this court held that the SUNY dormitories are non-public forums for purposes of commercial speech activity.[9] The court further held that the Resolution was reasonable in relation to the forum's purpose.[10] Accordingly, the court dismissed plaintiffs' complaint and granted judgment in defendants' favor.

Pending appeal to the Second Circuit, AFS was dropped as a party and proceeded strictly as an amicus, leaving only the student plaintiffs as appellants. The Second Circuit deemed that change in parties significant, explaining:

> Since this case no longer involves the rights of third persons to gain access to state-owned property to give or receive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights, the public forum cases thought applicable by the district court are inapposite.[11]

The Second Circuit went on to apply the *Central Hudson* factors, deciding, in the words of Justice Scalia, "[t]hat it was

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6. *Id.* at 767.

7. *Id.* at 765.

8. *See Fox v. Board of Trustees,* 695 F.Supp. 1409, 1411 n. 2 (N.D.N.Y.1988) ("*Fox III*").

9. *Fox v. Board of Trustees,* 649 F.Supp. 1393, 1400-01 (N.D.N.Y.1986) ("*Fox I*").

10. *Id.* at 1401-02. In light of that holding the court refused to separately consider plaintiffs' constitutional challenge to the interim regulations.

11. *Fox v. Board of Trustees,* 841 F.2d 1207, 1212 (2d Cir.1988) ("*Fox II*").

unclear whether Resolution 66-156 directly advanced the State's asserted interests and whether, if it did, it was the least restrictive means to that end."[12] The Second Circuit therefore reversed this court's judgment and remanded for "a suitable order" based upon "appropriate findings."[13]

On remand, this court applied the *Central Hudson* test in a manner consistent with the Second Circuit's instructions in *Fox II,* finding that even if the Resolution directly advanced the University's asserted interests, it was not the least restrictive means for advancing those interests.[14] The court reached the same conclusion with respect to the interim regulations, and thus declared both the Resolution and the interim regulations to be "unconstitutional infringements."[15] On October 3, 1988, the same day that the decision was issued, the Supreme Court granted certiorari.[16] Consequently the proceedings were stayed, including enforcement of the court's order and judgment on remand, pending a decision by the Supreme Court.[17]

When the case eventually reached the Supreme Court, that Court agreed that the primary attack upon the Resolution pertained to its application to commercial speech, and that *Central Hudson* provides the appropriate analytical framework. The Court observed, however, that the Resolution also reached some non-commercial speech—a factor which neither this court nor the Circuit Court had considered.[18] While agreeing that the governmental interests advanced as justification for the Resolution were substantial,[19] the Supreme Court disagreed with the terms of the Second Circuit's remand. In particular, the Supreme Court differed with the Second Circuit's interpretation of the last element of the *Central Hudson* test.

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12. *Board of Trustees v. Fox,* 492 U.S. 469, 109 S.Ct. 3028, 3031, 106 L.Ed.2d 388 (1989) ("*Fox IV*").

13. *Fox II,* 841 F.2d at 1214.

14. *Fox III,* 695 F.Supp. at 1413.

15. *Id.* at 1413-14.

16. *Board of Trustees v. Fox,* 488 U.S. 815, 109 S.Ct. 52, 102 L.Ed.2d 31 (1988).

17. *See* Stipulation, No. 82-CV-1363 (November 23, 1988).

18. *Fox IV,* 492 U.S. at 483-85, 109 S.Ct. at 3037, 106 L.Ed.2d 388.

19. *Id.* at 474-76, 109 S.Ct. at 3032, 106 L.Ed.2d at 400-01.

After engaging in a comprehensive analysis of Supreme Court decisions involving government restrictions upon commercial speech, the Supreme Court explained:

> What our decisions require is a ' "fit" between the legislature's ends and the means chosen to accomplish those ends,' . . .—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . ; that employs not necessarily the least restrictive means but, . . . , a means narrowly tailored to achieve the desired objective.[20]

The Court therefore reversed the judgment of the Second Circuit and remanded:

> [f]or determination, pursuant to the standards described above, of the validity of this law's application to the commercial and noncommercial speech that is the subject of the complaint; and, if its application to speech in either such category is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.[21]

Incorporating that language, on September 26, 1989, the Second Circuit then issued a mandate remanding the action to this court. By direction of this court, the parties filed memorandums of law with the court setting forth their respective positions on the remand issues.

DISCUSSION

I. Mootness

Before undertaking a constitutional analysis of the Resolution, there is one critical issue which the court must first address and that is whether this action is now moot.[22] Defen-

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20. *Id.* at 480, 109 S.Ct. at 3035, 106 L.Ed.2d at 403 (citations omitted).

21. *Id.* at 486, 109 S.Ct. at 3038, 106 L.Ed.2d at 407.

22. In their initial brief, plaintiffs imply that because defendants did not raise the mootness issue until "this late date," and because they did not raise it on appeal, the court should disregard that issue. Brief for the Plaintiffs at 1, n. 1. Plaintiffs overlook the fact, however, that mootness is a jurisdictional defect. The court therefore would have had an obligation to consider it *sua sponte*, even if defendants did not raise the issue, and that obligation is a

dants make a convincing argument that because the ten plaintiffs are no longer residents of SUNY dormitories, and in fact are no longer SUNY students, they have no "legally cognizable interest in the outcome," and thus the issues raised on this remand are no longer justiciable, rendering the case moot. Plaintiffs, without providing much analysis, proffer four reasons, which will be fully discussed herein, as to why this case is not moot, despite the fact that they have moved from the SUNY dormitories and graduated. Plaintiffs further respond that, at a minimum, they should be allowed to file an amended complaint to join as plaintiffs a number of current students who, at least in the winter of 1990, were also elected student government leaders.[23] (Clearly, if the court permits such an amendment, it must hold in abeyance the remand issues until the complaint has been properly amended.)

[1] A brief overview of the origins of the mootness doctrine will help to put in perspective the various arguments made by the parties regarding that doctrine. The concept of mootness is rooted in the "case or controversy" requirement found in Article III of the United States Constitution. *See De Funis v. Odegaard,* 416 U.S. 312, 316, 94 S.Ct. 1704, 1705, 40 L.Ed.2d 164 (1974). The Supreme Court has explained that, for Article III purposes, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S.Ct 1379, 1383, 59 L.Ed.2d 642

NOTES *(Continued)*

continuing one. *Seibert v. Sperry Rand Corp.,* 586 F.2d 949, 951 (2d Cir.1978) (citing *North Carolina v. Rice,* 404 U.S. 244, 245-46, 92 S.Ct. 402, 403-04, 30 L.Ed.2d 413 (1971)). *See also R.C Bigelow, Inc. v. Unilever N. V.* 867 F.2d 102, 105 (2d Cir.), *cert. denied,* ___U.S. ___, 110 S.Ct. 64, 107 L.Ed.2d 31 (1989) ("The case must be 'live' at every stage of the proceeding, including the appeal."). Thus, at what point in the litigation the mootness issue is raised or whether it is even raised at all by the parties is of little or no consequence. *See Barilla v. Ervin,* 886 F.2d 1514, 1519 (9th Cir.1989) ("[c]ourt cannot be divested of its obligation to consider the issue of mootness on the grounds that the timing or manner in which a party has raised the issue is somehow procedurally improper.")

23. *See* Reply Brief for Plaintiffs at 8 n. 12 and Ex. A thereto.

(1979), (*quoting Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). In addition to the constitutional component of the mootness doctrine, there exists what has been described as "a melange of doctrines relating to the court's discretion in matters of remedy and judicial administration." *Chamber of Commerce v. U.S. Dept. of Energy*, 627 F.2d 289, 291 (D.C.Cir.1980) (citing 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3533 at 266-70 (1975)). Thus, a case may be dismissed as moot, even when it has technically satisfied the Article III case or controversy requirement if "a controversy, . . . , is so attentuated that considerations of prudence and comity for co-ordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." *Id. See also New York Guardian Mortgagee Corp. v. Cleland*, 473 F.Supp. 409, 418 (S.D.N.Y.1979) (recognizing discretionary or prudential aspects of mootness doctrine). A defendant seeking to dismiss a case as moot, however, bears a heavy burden. *United States v. W.T Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

A. Repeat and Evade Review

One long recognized exception to the mootness doctrine is that a matter which is "capable of repetition, yet evading review," will not be deemed moot. That exception was first clearly articulated in *Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911). *Southern Pacific* involved a challenge to an Interstate Commerce Commission cease and desist order. The Supreme Court granted review of an otherwise moot issue in that case because the challenged order was of such short duration as to preclude litigation before its expiration, and because the same plaintiffs were likely to be affected by the same type of order in the future. *Id.* at 514-15, 31 S.Ct. at 283, 55 L.Ed. at 315-16.

[2] In determining whether these plaintiffs may properly rely upon this exception, the court is guided by the test set forth in *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d. 350 (1975). In *Weinstein* the Supreme Court stated, "[i]n the absence of a class action, the 'capable of repetition, yet evading review' doctrine [is] limited to the situa-

tion where two elements combine[]. . . ." Id. at 149, 96 S.Ct. at 349. The first element, as defined by the Court, is that the challenged action must be "too short to be fully litigated prior to its cessation or expiration. . . ." *Id.* Second, there must be "[a] reasonable expectation that the same complaining party [will] be subjected to the same action again." *Id.* With respect to this second element, the Supreme Court has interpreted "reasonable expectation" with varying degrees of probability ranging from "demonstrated probability" to "some likelihood." *See Honig v. Doe,* 484 U.S. 305, 318 n. 6, 108 S.Ct. 592, 601 n. 6, 98 L.Ed.2d 686 (1988).

The plaintiffs in the present action are not entitled to rely upon this limited exception to the mootness doctrine, however, because they cannot show that the first element of *Weinstein* is satisfied here. The facts of the present case stand in sharp contrast to those in which courts have found that the first *Weinstein* element was met. In *United States v. Johnson,* 801 F.2d 597 (2d Cir.1986), for example, although the Court ultimately held that the issues raised on appeal were moot, it did recognize that the first element of *Weinstein* was established where the defendant "could not litigate the validity of the order compelling his testimony prior to its expiration." *Id.* at 601. Similarly, in *Sloan v. Securities and Exchange Commission,* 547 F.2d 152 (2d Cir.1976), *aff'd on other grounds,* 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978), the Second Circuit concluded, "[b]ecause of the SEC's continuing policy of roll-over ten-day suspension orders, the harm to him [plaintiff] was 'capable of repetition, yet evading review.' " *Id.* at 158.

[3] In this action, on the other hand, the challenged action—the University's enforcement of the Resolution—is not the sort of action which, by reason of the inherently short nature of the opportunity for remedy, is likely forever to "evade review." It is true that this litigation has been lengthy so that the present plaintiffs have been unable to have the merits of their lawsuit finally resolved within the four years a student typically remains enrolled in a university. The difficult constitutional issues raised herein have, in large part, contributed to that delay however, and *not* the nature of the chal-

lenged action itself. The challenged action in and of itself is not so inherently short in duration that if a future SUNY student decided to challenge this same Resolution, that action would become moot again. *See De Funis,* 416 U.S. at 318-19, 94 S.Ct. at 1707, 40 L.Ed.2d 164 ("capable of repetition, yet evading review" exception inapplicable because there was no reason to suppose that future attacks on admissions' procedures of law school would evade review).

Indeed, given the fact that this court has now had the benefit of the Supreme Court's guidance with respect to the first amendment issues raised herein, a subsequent similar action would no doubt be swiftly resolved, and in any event certainly before the passage of an additional four years. This is not a situation where defendants have indicated their intent to rescind or substantially modify the Resolution so as to defeat the claims of these or subsequent plaintiffs.[24] Thus, because these plaintiffs have not shown that the challenged action is "too short to be fully litigated prior to its cessation or expiration," they cannot be permitted to rely on the "capable of repetition, yet evading review" exception to avoid application of the mootness doctrine.

As previously stated, the Supreme Court has specifically required that the two elements defined in *Weinstein* must "combine" before a plaintiff may rely on the "capable of repetition, yet evading review," exception to the mootness doctrine. Therefore, the fact that these plaintiffs cannot satisfy the first element of the *Weinstein* test is fatal to their argument that the "capable of repetition, yet evading review," exception applies here. Consequently the court need not, and will not, consider whether plaintiffs are able to met the second element of *Weinstein.*

B. Representational Capacity

[4] Plaintiffs' second response to the mootness argument by defendants is that they are litigating "in a representational capacity for the student government, and thus their claims cannot be mooted even though plaintiffs themselves have

24. *See* Letter of Henry T. Reath to Court (March 13, 1990) at 1.

graduated."[25] Plaintiffs, without offering any analysis, simply cite two cases which they believe support this proposition. In the court's view, however, those cases are readily distinguishable from the present one.

In *Trachtman v. Anker,* 563 F.2d 512 (2d Cir.1977), *cert. denied,* 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978), at the time the action was commenced, one of the plaintiffs was a student in his senior year at Stuyvesant High School, and editor-in-chief of a student publication there. (The other plaintiff was the student's father.) On appeal the Second Circuit observed that because the high school's graduation was scheduled fairly soon after argument of the appeal, the plaintiff student "may no longer be a member of the student body." [26] That fact, in the Court's view, did not moot the case because the student plaintiff "[w]as acting not only as a student but in a representational capacity as editor-in-chief of [the student publication]."[27] The Court further explained that "[t]he complaint requests relief on behalf of 'plaintiffs and other [sic] similarly situated,' " and thus, the Court reasoned that even though "[t]he complaint did not formally so assert, Trachtman [the student plaintiff] was litigating in a representational capacity."[28] Therefore, the Court held that although the plaintiff student had graduated, his case did not become moot because, *inter alia,* "[p]laintiffs may be considered as acting on behalf of a student association and its members who have a continuing stake in this litigation."[29]

Plaintiffs are also relying upon *Brandon v. Board of Education,* 487 F.Supp. 1219 (N.D.N.Y.), *aff'd,* 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981), a prior decision of this court. In *Brandon* a group of high school students brought a lawsuit challenging defendants' refusal to allow them to use a school room in which to conduct daily pray meetings before the start of the school day. Defendants raised the mootness claim in an

25. Reply Brief for the Plaintiffs at 7.
26. *Id.* at 514, n. 1.
27. *Id.*
28. *Id.*
29. *Id.*

amended answer with respect to three students who, since the filing of the complaint, had graduated. This court held, and the Second Circuit agreed, that dismissal on mootness grounds was not required because, for one reason,[30] "[t]he pleadings indicate that this action was commenced by the plaintiffs, not only on their own behalf but as representatives of the organization 'Students for Voluntary Prayer' and on behalf of all students similarly situated."[31] On appeal, the Second Circuit also observed that because plaintiffs' claims for monetary damages "remain[ed] extant," no mootness problem existed.[32]

Apparently plaintiffs believe that they are entitled to rely upon *Trachtman* and *Brandon* because this group of plaintiffs is comprised, in part, of students who are (or were) officers and other elected representatives of the student government.[33] Plaintiffs also note that several student organizations have supported plaintiffs' position as amici curiae before the appellate courts.[34] Plaintiffs completely disregard the fact though that, unlike *Trachtman* and *Brandon*, the pleadings before the court here do not demonstrate that plaintiffs are bringing this action on behalf of themselves and all others similarly situated. Nor is any particular student association named as a plaintiff in this action.[35] Finally, plaintiffs obviously have not made any attempt to have a class certified under Fed.Rule Civ.Proc. 23.

Moreover, even if plaintiffs' conduct during the course of this litigation to date could somehow be interpreted to mean that plaintiffs have been proceeding as a Rule 23 class, none-

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30. This court also relied on the fact that at the time of plaintiffs' summary judgment motion, there were still plaintiffs to the action who were then enrolled in school. *Brandon*, 487 F.Supp. at 1224. But, by the time the case reached the Second Circuit, all of the plaintiffs had graduated. *Brandon*, 635 F.2d at 973 n. 1.

31. *Id.* at 1224-25 (citing *Trachtman*, 563 F.2d 512, 514 n. 1).

32. *Brandon*, 635 F.2d at 973, n. 1

33. Reply Brief at 7, n. 11.

34. *Id.*

35. In the context of standing, in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1977), the Supreme Court made clear that the association *itself* must bring the action on behalf of its members. *Id.* at 515, 95 S.Ct. at 2213, 45 L.Ed.2d 343 (emphasis added).

theless, they could not overcome defendants' mootness argument on that basis. That is so because in *Board of School Com'rs of City of Indianapolis v. Jacobs,* 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975), the Supreme Court held that even where there was an attempt to certify the class under Rule 23, the case was nevertheless moot because there was not full compliance with the certification requirements of Rule 23. The plaintiffs in *Jacobs* had purportedly instituted an action on "behalf of all high school students attending Indianapolis public schools."[36] The Supreme Court explained that in such a case, "[t]he need for definition of the class purported to be represented by the named plaintiffs is especially important . . . [because] the litigation is likely to become moot as to the initially named plaintiffs prior to the exhaustion of appellate review."[37]

C. Overbreadth Challenge

[5] Based solely upon *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), plaintiffs assert that this action is not moot because in addition to challenging the constitutionality of the Resolution as it applies to them, their constitutional claim also includes a claim that it is overbroad.[38] In *Broadrick,* the Supreme Court relaxed its prudential rules of standing by making a limited exception to the general rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconsti-

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36. 420 U.S. at 131, 95 S.Ct. at 850, 43 L.Ed.2d 74.

37. *Id.* at 130, 95 S.Ct. at 850, 43 L.Ed.2d 74.

38. In *Fox IV* the Supreme Court explained the difference between an as-applied and an overbreadth constitutional challenge as follows:

> [t]he rule employed in as-applied analysis that a statute regulating commercial speech must be 'narrowly tailored,' . . . , prevents a statute from being overbroad. The overbreadth doctrine differs from that rule principally in this: The person invoking the commercial-speech narrow-tailoring rule asserts that *the acts of his that are the subject of the litigation* fall outside what a properly drawn prohibition could cover.

492 U.S. at 482, 109 S.Ct. at 3036, 106 L.Ed.2d 388 (emphasis in original).

tutional."[39] Specifically, in *Broadrick* the Court held that that rule does not apply when a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[40]

Relying upon the fact that ordinarily overbreadth challenges, by their very nature, involve the rights of third persons who are not parties to the action, plaintiffs believe their overbreadth claim can save this case from mootness. There is at least one fundamental flaw with that position; specifically, plaintiffs are conveniently disregarding the fact that, at least up until the time defendants raised the issue of mootness, the overbreadth challenge related solely to the application of the Resolution to these student plaintiffs. In fact, the Supreme Court recognized as much when it stated:

> Respondents' [plaintiffs'] invocation of the doctrine [overbreadth] in the present case is unusual in that the asserted extensions of Resolution 66-156 beyond commercial speech that are the basis for their overbreadth challenge *are not hypothetical applications to third parties, but applications to the student respondents themselves,* which were part of the subject of the complaint and of the testimony adduced at trial.

492 U.S. at 483, 109 S.Ct. at 3036-37, 106 L.Ed.2d 388 (emphasis added). The Court then discussed the origins of the first amendment overbreadth doctrine, concluding that it has potential applicability to the unique facts of this case because "[w]hile the overbreadth doctrine was born as an expansion of the law of standing, it would produce absurd results to limit its application strictly to that context." *Id.* at 483, 109 S.Ct. at 3037, 106 L.Ed.2d 388.

Thus, assuming *arguendo* that an overbreadth challenge would operate to defeat plaintiffs' apparent mootness problem, these plaintiffs cannot make such an argument. That is so because they have not sought to invoke the overbreadth doctrine on behalf of third parties, such as students currently

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39. *United States v. Raines,* 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960) (citing cases).

40. *Broadrick,* 413 U.S. at 612, 93 S.Ct. at 2916, 37 L.Ed.2d 830.

enrolled at the University whose rights may arguably be affected by enforcement of this Resolution. Rather, as the Supreme Court observed, plaintiffs have consistently limited their overbreadth challenge to only themselves. Now, at this late date, plaintiffs cannot broaden the scope of their constitutional challenge simply as a means of avoiding the fact that their action may have become moot.

D. Attorneys' Fees, Costs, and Nominal Damages

[6] It is true that " '[c]laims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable.' " *Stokes v. Wurtsboro,* 818 F.2d 4, 6 (2d Cir.1987) (*quoting* 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.3 at 262 (1984 ed.)) (and cases cited therein). Plaintiffs' verified amended complaint is completely void, however, of any claims for monetary damages. Despite that fact, plaintiffs maintain that they are seeking attorney's fees, costs, and nominal damages, and thus those claims prevent their claim for declaratory relief from being moot. A closer examination of the amended complaint, as well as an examination of the applicable law reveals, however, that this too is an untenable position.

First of all, while there is case support for the proposition that even "nominal damages" will save a case from mootness,[41] there is absolutely no specific mention in plaintiffs' verified amended complaint of nominal damages. Nor can a request for such damages be inferred from the language of that complaint. Perhaps plaintiffs are under the impression that this court will construe the standard, boilerplate language in their "wherefore" clause seeking "such other relief as the Court deems just and proper,"[42] as a request for nominal dam-

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41. *See Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir.1978) (emphasis added) ("The availability of either *nominal damages* or substantial damages is sufficient to prevent this case from becoming moot.") (citing *Powell v. McCormack*, 395 U.S. 486, 495-500, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)); and *Steinberg v. U.S. Dept. of Agriculture*, 613 F.Supp. 432, 436 (E.D.N.Y.1994) ("Since there is a possible claim for at least nominal damages, it is appropriate to look beyond defendants' mootness argument, and to view the viability of plaintiffs' claim on substantive grounds.")

42. *See* Verified Amended Complaint.

ages, and then rely on the same to salvage this case from mootness. If so, plaintiffs are mistaken.

In *Perrucci v. Gaffey,* 450 F.2d 356 (2d Cir.1971), there were no proper damages allegations averred in the complaint; "the allegation was limited to 'expenses and loss' incurred by plaintiff in bringing the action." *Id.* at 358. Plaintiff had, however, "[a]ttempt[ed] to breath life into a moribund dispute,"[43] after the court issued a memorandum decision, *sua sponte* dismissing plaintiff's action, by amending his complaint to allege damages in excess of $10,000 "exclusive of interest and costs." *Id.* Despite that amendment, the Second Circuit concluded that the appeal was moot and that the district court should have dismissed the action for that reason. *Id.* In light of *Perrucci,* this court simply cannot read into plaintiffs' amended complaint a claim for damages, nominal or otherwise, where none exists.[44]

Nor can plaintiffs save this action from mootness based upon their attorneys' fees claim. A request for attorney's fees will not preserve a case which otherwise has become moot on appeal. *See Washington Market Co. v. District of Columbia,* 137 U.S. 62, 11 S.Ct. 4, 34 L.Ed. 572 (1890). "The question of attorney's fees is ancillary to the underlying action and survives independently under the Court's equitable jurisdiction." *United States v. Ford,* 650 F.2d 1141, 1144 (9th Cir.1981), *cert. denied sub nom., Midwest Growers Cooperative v. United States,* 455 U.S. 942, 102 S.Ct. 1437, 71 L.Ed.2d 654 (1982). "Thus a determination of mootness neither precludes nor is precluded by an award of attorneys' fees." *Doe v. Marshall,* 622 F.2d 118, 120 (5th Cir.1980), *cert. denied,* 462 U.S. 1119, 103 S.Ct. 3087, 77 L.Ed.2d 1349 (1983). The Supreme Court has soundly reasoned, however, that:

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43. *McCabe v. Nassau County Medical Center,* 453 F.2d 698, 702 (2d Cir.1971).

44. Plaintiffs reliance on *Brandon, supra,* is completely misplaced. In sharp contrast to the present case, in *Brandon* plaintiffs' claim for relief included a "sizable demand for damages," which, *inter alia,* prevented it from becoming moot. *Brandon,* 487 F.Supp. at 1225.

> [An] interest in attorney's fees is . . . *insufficient* to create an Article III case or controversy where none exists on the merits of the underlying claim, ... Where on the face of the record it appears that the only concrete interest in the controversy has terminated, reasonable caution is needed to be sure that mooted litigation is not pressed forward, and unnecessary judicial pronouncements on even constitutional issues obtained, solely in order to obtain reimbursement of sunk costs.

Lewis v. Continental Bank Corp., 494 U.S. 472, 110 S.Ct. 1249, 1255, 108 L.Ed.2d 400 (1990) (citations omitted) (emphasis added). Were this court to proceed, as plaintiffs suggest, and decide the constitutional issue based on the existence of the attorneys' fees claim, it would be acting in direct contravention of *Lewis;* and that it cannot do. Thus, the existence of plaintiffs' attorneys' fees claim cannot defeat what appears to be an otherwise moot case.

Finally, in his dissenting opinion in *Bank of Marin v. England,* 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966), Justice Fortas points to "[a]n unbroken line of cases [which] establish[ ] the rule that controversy as to costs does does not salvage an otherwise moot *Id.* at 111, n. 1, 87 S.Ct. at 281, n. 1, 17 L.Ed.2d 197. Consequently, as with the attorneys' fees claim, the mere fact that plaintiffs are also seeking costs cannot save their case from becoming moot.

In sum, because plaintiffs have not requested damages, and because neither a claim for costs nor a claim for attorneys' fees precludes a finding of mootness, plaintiffs cannot overcome defendants' mootness argument by relying on the existence of those claims in their amended complaint.

II. Amendment of the Complaint

[7] Having agreed with defendants that plaintiffs' graduation and departure from SUNY dormitories renders this action moot, the court must now confront plaintiffs' assertion that they should be allowed to amend their complaint so as to avoid dismissal of the action on mootness grounds.[45] Accord-

45. Although plaintiffs did not file a formal notice of motion seeking leave to amend, they did make that specific request in their Reply Brief, and

ing to Fed.R.Civ.P. 15(a), leave to amend "shall be freely given when justice so requires." The obvious intent of that language is to evince a bias in favor of granting leave to amend. The Supreme Court has made clear that "this mandate is to be heeded," and that leave to amend should be permitted in the absence of an apparent or declared reason, such as undue delay, bad faith, or undue prejudice to the opposing party. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

The Second Circuit has indicated that the last factor—undue prejudice—is "perhaps most important." *State Teachers Retirement Bd. v. Fluor Corp.,* 654 F.2d 843, 856 (2d Cir.1981). And, it has been recognized that the party opposing the amendment has the burden of showing prejudice. *In Re Gallaudet,* 40 B.R. 828, 830 (Bankr.Vt. 1984) (citing, *Beeck v. Aquaslide 'N' Dive Corp.,* 562 F.2d 537, 540 (8th Cir.1977)). The court may also consider judicial economy and the most expeditious way to dispose of the merits of the litigation. *See generally* Fed.R.Civ.P. 1 (rules to be construed "to secure the just, speedy, and inexpensive determination of every action").

[8] It should be noted that mere delay alone will not suffice as a basis for denying the right to amend. *Richardson Greenshields Secur., Inc. v. Mui-Hin Lau,* 825 F.2d 647, 653 n. 6 (2d Cir.1987). In the context of amending a complaint for example, parties have been allowed to assert new claims long after they acquired the facts necessary to support such claims. *See, e.g., Middle Atlantic Utilities Co. v. S.M.W. Development Corp.,* 392 F.2d 380, 385 (2d Cir.1968) (amendment allowed after three year interval even though plaintiff was aware of facts supporting new claims two years before filing of original complaint). Finally, when considering a motion to amend, district courts in this Circuit are guided, in part, by *United States on behalf of Maritime Admin. v. Continental Illinois Nat. Bank and Trust,* 889 F.2d 1248 (2d Cir.1989). In Continental Illinois, the Second Circuit explained:

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the court will treat that request as a motion without requiring the usual separate notice of motion. *See* Reply Brief at 8, n. 12. Defendants will not be prejudiced by this because it seems that they too treated plaintiffs' informal request as a motion, or at least responded to it as such.

> As *Foman* makes clear, the denial of leave to amend a pleading may be overturned only if the denial constitutes an abuse of the district court's discretion. . . . On the other hand, as *Foman* makes equally and explicitly clear, that discretion must be exercised in terms of a justifying reason or reasons consonant with the liberalizing 'spirit of the Federal Rules.'

Id. at 1254 (citations omitted).

[9] The only objection to amending the complaint seriously pressed by defendants is their claim of undue prejudice. In particular, defendants suggest that allowing amendment of the complaint to name new plaintiffs here would require them "[t]o guess at the nature of their grievances and the gravamen of their claims. . . . "[46] That assertion simply is not supported by the facts, however. The four proposed plaintiffs would be relying on the same amended complaint as are the current plaintiffs.[47] Moreover, plaintiffs' counsel has emphatically stated:

> Any new Plaintiffs that join in the existing complaint accept the contentions advanced and argued before the United States Supreme Court by the existing Plaintiffs. No effort is being made by either the present or the substituted Plaintiffs to broaden or modify those contentions. . . .[48]

In light of that unequivocal statement, there is no reason to believe, and defendants have not asserted, that they will have to engage in additional expense or discovery as a result of permitting the amendment. Thus, where the issues remain identical and no new or additional claims are being added, and where the proposed plaintiffs are alleging the same injury as did the original plaintiffs, the court is not persuaded that defendants have met their burden of showing prejudice. Additionally, in the absence of prejudice to defendants, granting plaintiffs' request will fulfill the purpose of Rule 15(a), which

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46. Letter from State Assistant Attorney General Daniel Smirlock to Court (March 8, 1990).

47. *See* Reply Brief, Ex. A thereto (affidavits of proposed new plaintiffs).

48. Letter from plaintiffs' counsel, Henry T. Reath (March 13, 1990).

is "[t]o permit a final decision on the merits rather than on procedural niceties,"[49] and result in a more expeditious resolution of this action.

CONCLUSION

This case, involving important first amendment issues, has been moving through the federal courts for nine years. There is little doubt that plaintiffs could have and probably should have been certified as a class pursuant to Fed.R.Civ.Pro. 23 at the inception of this action. Not having done so, this matter is in danger of being dismissed on the mootness grounds.

Plaintiffs have offered several theories to avoid mootness; but, as discussed herein, they cannot prevail on any of those theories. Their claim that this action is "capable of repetition, yet evading review" offers, at best, a tenuous application of, that doctrine. Plaintiffs statement that they are litigating in a representational capacity simply is not supported by the record. Plaintiffs' overbreadth argument is similarly unavailing. Throughout this litigation plaintiffs have argued that doctrine only insofar as the Resolution is allegedly overbroad with respect to their rights —not, as is typically done, with respect to the rights of unnamed third parties. And so, given the manner in which plaintiffs chose to present this claim, its mere existence cannot now salvage this case from becoming moot. Finally, never having requested or sought damages, plaintiffs cannot rely on such a claim to evade a finding of mootness; nor are their claims for attorneys' fees and costs, standing alone, sufficient to keep this case alive. Survival of jurisdiction then is necessarily predicated on the court's favorable treatment of plaintiffs' request to amend their complaint to add current SUNY students as plaintiffs. To grant plaintiffs leave to amend their complaint will cause no prejudice to the defendants and will advance this matter to a resolution on its merits.

Accordingly:

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49. *See Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957).

(1) Plaintiffs are granted leave to file within thirty (30) days of the date hereof an amended complaint adding student plaintiffs as requested; [50]
(2) Defendants shall file an amended answer as required by the Federal Rules of Civil Procedure; and
(3) Upon joinder of issue the court will proceed to consider and rule on the remaining issues on remand.
No further briefing is required or permitted.
IT IS SO ORDERED.

50. Unless, of course, those students have also graduated. In that event, plaintiffs' counsel may substitute appropriate current SUNY students.

BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK ET AL. *v.* FOX ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87-2013. Argued February 22, 1989—Decided June 29, 1989

Resolution 66-156 of the State University of New York (SUNY) prohibits private commercial enterprises from operating in SUNY facilities. After the resolution was applied by campus police to bar American Future Systems, Inc. (AFS), from demonstrating and selling its housewares at a party hosted in a student dormitory, respondent Fox and other students sued for a declaratory judgment that such action violated the First Amendment. The District Court preliminarily enjoined enforcement of the resolution but, after a trial, found for SUNY on the ground that its dormitories did not constitute a public forum for purposes of commercial activity, and that the restrictions on speech were reasonable in light of the dormitories' purpose. Viewing the challenged application of the resolution as a restriction on commercial speech, and therefore applying the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U. S. 557, the Court of Appeals concluded that it was unclear whether the resolution directly advanced the State's asserted interests and whether, if it did, it was the least restrictive means to that end. The court therefore reversed and remanded to the trial court.

Held:

1. The Court of Appeals erred in requiring the District Court to apply a least-restrictive-means test to Resolution 66-156. Pp. 473-481.

(a) The AFS parties the students seek to hold propose a commercial transaction and therefore constitute commercial speech. Although they also touch upon other subjects, such as how to be financially responsible and run an efficient home, this does not render them noncommercial in

their entirety on the theory that fully protected, educational speech and commercial speech are "inextricably intertwined." *Riley v. National Federation of Blind of North Carolina, Inc.*, 487 U. S. 781, distinguished. Pp. 473-475.

Although *Central Hudson* and other decisions have occasionally contained statements suggesting that government restrictions on commercial speech must constitute the least restrictive means of achieving the governmental interests asserted, those decisions have never required that the restriction be absolutely the least severe that will achieve the desired end. Rather, the decisions require only a reasonable "fit" between the government's ends and the means chosen to accomplish those ends. See, *e. g., Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U. S. 328, 341; *In re R. M. J.*, 455 U. S. 191, 203. So long as the means are narrowly tailored to achieve the desired objective, it is for governmental decisionmakers to judge what manner of regulation may be employed. Pp. 475-481.

2. Respondents' overbreadth claim—which is based on the assertion that Resolution 66-156 impermissibly prohibits their fully protected, non-commercial speech—is not ripe for resolution in this Court. Pp. 481-486.

(a) Although overbreadth analysis does not normally apply to commercial speech, Resolution 66-156 must be deemed to reach some non-commercial speech in light of evidence that it prohibits for-profit job counseling, tutoring, legal advice, and medical consultation in students' dormitory rooms. While such conduct consists of speech for profit, it does not satisfy the definition of commercial speech since it does not *propose* a commercial transaction. Pp. 481-482.

(b) The overbreadth doctrine was designed as a departure from traditional rules of standing, enabling persons who are themselves unharmed by a statute to challenge it facially on the ground that it may be applied unconstitutionally to others, in situations not before the Court. *Broadrick v. Oklahoma*, 413 U. S. 601, 610, 613. Respondents' invocation of the doctrine is unusual because the asserted extensions of Resolution 66-156 beyond commercial speech that are the basis for their challenge are not hypothetical appli-

cations to third parties, but applications to respondents themselves, which were part of the subject of the complaint and the testimony adduced at trial. Nevertheless, there is no reason why the doctrine cannot be invoked in this situation. Pp. 482-484.

(c) However, an as-applied challenge should ordinarily be decided before an overbreadth claim, for reasons relating both to the proper functioning of courts and to their efficiency. Here, neither of the courts below ever considered respondents' as-applied challenge under the proper legal standards, nor apparently even recognized that the case involves both commercial and noncommercial speech. On remand, the question whether Resolution 66-156's alleged substantial overbreadth makes it unenforceable should be addressed only if it is first determined that its application to speech in either category is valid. Pp. 484-486.

841 F. 2d 1207, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 486.

O. Peter Sherwood, Solicitor General of New York, argued the cause for petitioners. With him on the briefs were *Robert Abrams,* Attorney General, *Peter H. Schiff* and *Lawrence S. Kahn,* Deputy Solicitors General, and *Daniel Smirlock,* Assistant Attorney General.

Henry T. Reath argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the American Council on Education et al. by *Richard D. Marks* and *Sheldon E. Steinbach;* and for the Board of Trustees of the University of Alabama et al. by *Roderick K. Daane, Anthony J. Celebrezze, Jr.,* Attorney General of Ohio, and *Lacy H. Thornburg,* Attorney General of North Carolina.

Briefs of *amici curiae* urging affirmance were filed for the American Advertising Federation, Inc., by *David S. Versfelt, William W. Rogal,* and *Gilbert H. Weil;* for the Landmark Legal Foundation by *Mark J. Bredemeier, Jerald L. Hill,* and *Jonathan W. Emord;* and for the Student Association of the State University of New York, Inc., et al. by *Lanny E. Walter.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end.

I

The State University of New York (SUNY) has promulgated regulations governing the use of school property, including dormitories. One of these, Resolution 66-156 (1979), states:

> "No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events."

American Future Systems, Inc. (AFS), is a company that sells housewares, such as china, crystal, and silverware, to college students; it markets its products exclusively by the technique popularly called (after the company that pioneered it) "Tupperware parties." This consists of demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward).

In October 1982, an AFS representative was conducting a demonstration of the company's products in a student's dormitory room at SUNY's Cortland campus. Campus police asked her to leave because she was violating Resolution 66-156. When she refused, they arrested her and charged her with trespass, soliciting without a permit, and loitering. Respondent Fox, along with several fellow students at SUNY/Cortland, sued for declaratory judgment that in prohibiting their hosting

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NOTES *(Continued)*

Marsha S. Berzon and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae.*

and attending AFS demonstrations, and preventing their discussions with other "commercial invitees" in their rooms, Resolution 66-156 violated the First Amendment. AFS joined the students as a plaintiff. The District Court granted a preliminary injunction, *American Future Systems, Inc. v. State University of New York College at Cortland,* 565 F. Supp. 754 (NDNY 1983), but, after a trial, found for the university on the ground that the SUNY dormitories did not constitute a public forum for the purpose of commercial activity and that the restrictions on speech were reasonable in light of the dormitories' purpose, 649 F. Supp. 1393 (1986).

A divided panel of the Court of Appeals for the Second Circuit reversed and remanded. 841 F. 2d 1207 (1988). Because AFS had dropped out of the suit as a party, the only remaining issue was the students' claim that their First Amendment rights had been infringed. Viewing the challenged application of Resolution 66-156 as a restriction on commercial speech, and therefore applying the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U. S. 557 (1980), the Court of Appeals concluded that it was unclear whether Resolution 66-156 directly advanced the State's asserted interests and whether, if it did, it was the least restrictive means to that end. The Court of Appeals therefore reversed the judgment and remanded to the trial court for "a suitable order" based upon "appropriate findings" on these points.[1] We granted certiorari, 488 U. S. 815 (1988).

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1. On October 3, 1988, the same day on which we granted certiorari, the District Court issued its decision on remand, striking down Resolution 66-156 because it did not accomplish the State's goals through the least restrictive means possible. 695 F. Supp. 1409 (NDNY). By stipulation of the parties the District Court stayed its mandate and all further proceedings pending our action. See Stipulation, No. 82-CV-1363 (Nov. 23, 1988).

II

In reviewing the reasoning the Court of Appeals used to decide this case,[2] the first question we confront is whether the principal type of expression at issue is commercial speech. There is no doubt that the AFS "Tupperware" parties the students seek to hold "propose a commercial transaction," *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976), which is the test for identifying commercial speech, see *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U. S. 328, 340 (1986). They also touch on other subjects, however, such as how to be financially responsible and how to run an efficient home. Relying on *Riley v. National Federation of Blind of North Carolina, Inc.*, 487 U. S. 781, 796 (1988), respondents contend that here pure speech and commercial speech are "inextricably intertwined," and that the entirety must therefore be classified as noncommercial. We disagree.

Riley involved a state-law requirement that in conducting fundraising for charitable organizations (which we have held to be fully protected speech) professional fundraisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities (instead of retained as commissions). In response to the State's contention that the statement was merely compelled commercial speech, we responded that, if so, it was "inextricably intertwined with otherwise fully protected speech," and that the level of First Amendment scrutiny must depend upon "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Ibid.* There, of course, the

2. Besides attacking the judgment on the ground that the Court of Appeals misperceived the constitutional principles governing restriction of commercial speech, the State argues that the resolution should be upheld even if the speech here was not commercial, because SUNY dormitories are not a public forum, and the restrictions constitute permissible "time, place, and manner" limitations. Pursuing such an analysis would require us to resolve both legal and factual issues that the Court of Appeals did not address. Since we find that the Court of Appeals must be reversed on the basis of its own analysis, we decline to go further.

commercial speech (if it was that) *was* "inextricably intertwined" because the state law *required* it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Including these home economics elements no more converted AFS' presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 67-68 (1983), communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U. S., at 563, n. 5." We discuss this case, then, on the basis that commercial speech is at issue.

We have described our mode of analyzing the lawfulness of restrictions on commercial speech as follows:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson,* 447 U. S., at 566.

The Court of Appeals held, and the parties agree, that the speech here proposes a lawful transaction, is not misleading,

and is therefore entitled to First Amendment protection. The Court of Appeals also held, and we agree, that the governmental interests asserted in support of the resolution are substantial: promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility. The Court of Appeals did not decide, however, whether Resolution 66-156 directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. As noted earlier, it remanded to the District Court for those determinations. We think that remand was correct, since further factual findings had to be made. It is the terms of the remand, however, that are the major issue here—specificially, those pertaining to the last element of the *Central Hudson* analysis. The Court of Appeals in effect instructed the District Court that it could find the resolution to be "not more extensive than is necessary" only if it is the "least restrictive measure" that could effectively protect the State's interests.

Our cases have repeatedly stated that government restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests, see, *e. g., Central Hudson, supra,* at 566; *Metromedia, Inc. v. San Diego,* 453 U. S. 490, 507-508 (1981) (plurality opinion); *In re R. M. J.,* 455 U. S. 191, 203 (1982); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S. 626, 644 (1985); *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U. S., at 343; *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U. S. 522, 535 (1987); *Shapero v. Kentucky Bar Assn.,* 486 U. S. 466, 472 (1988). If the word "necessary" is interpreted strictly, these statements would translate into the "least-restrictive-means" test used by the Court of Appeals here. There are undoubtedly formulations in some of our cases that support this view—for example, the statement in *Central Hudson* itself that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U. S., at 564. We have indeed assumed in dicta the validity of the "least-restrictive-means"

approach. See *Zauderer, supra,* at 644, 651, n. 14. However, as we long ago had occasion to observe with respect to the Necessary and Proper Clause of the Constitution, see *McCulloch v. Maryland,* 4 Wheat. 316 (1819), the word "necessary" is sometimes used more loosely. And other formulations in our commercial speech cases support a more flexible meaning for the *Central Hudson* test. In *In re R.M.J.* for example, we said that restrictions designed to prevent deceptive advertising must be "narrowly drawn," 455 U. S., at 203, and "no more extensive" than reasonably necessary to further substantial interests," *id.,* at 207; see also *id.,* at 203. We repeated the latter formulation last Term in *Shapero v. Kentucky Bar Assn., supra,* at 472. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, supra,* at 537, n. 16, we said that the application of the *Central Hudson* test was "substantially similar" to the application of the test for validity of time, place, and manner restrictions upon protected speech—which we have specifically held does *not* require least restrictive means. *Clark v. Community for Creative Non-Violence,* 468 U. S. 288 (1984); see also *infra,* at 478. Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.

Our jurisprudence has emphasized that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Assn.,* 436 U. S. 447, 456 (1978). The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State. See *Shelton v. Tucker,* 364 U. S. 479, 488 (1960); see also *Nixon v. Administrator of General Services,* 433 U. S. 425, 467 (1977). Cf. *Widmar v. Vincent,* 454 U. S. 263, 279, n. 3 (1981) (STEVENS, J., concurring in judgment).

We have refrained from imposing a least-restrictive-means requirement—even where core political speech is at issue—in assessing the validity of so-called time, place, and manner restrictions. We uphold such restrictions so long as they are "narrowly tailored" to serve a significant governmental interest, *Clark v. Community for Creative Non-Violence, supra, at 293; City Council of Los Angeles v. Taxpayers for Vincent,* 466 U. S. 789, 808 (1984), a standard that we have not interpreted to require elimination of all less restrictive alternatives, see, *e. g., Community for Creative Non-Violence, supra,* at 299; *Regan v. Time, Inc.,* 468 U. S. 641, 657 (1984) (plurality opinion) ("The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation"). Similarly with respect to government regulation of expressive conduct, including conduct expressive of political views. In requiring that to be "narrowly tailored" to serve an important or substantial state interest, see *Community for Creative Non-Violence, supra,* at 293, 298 (discussing *United States v. O'Brien,* 391 U. S. 367 (1968)); *Taxpayers for Vincent, supra,* at 804-805, we have not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interests," *Ward v. Rock Against Racism,* 491 U. S. 781, 799 (1989). And we have been loath to second-guess the Government's judgment to that effect. See *Community for Creative Non-Violence, supra,* at 299; *United States v. Albertini,* 472 U. S. 675, 689 (1985). While these two lines of authority do not of course govern here, we think it would be incompatible with the asserted "subordinate position [of commercial speech] in the scale of First Amendment values" to apply a more rigid standard in the present context.[3]

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3. It is interesting that in the expressive conduct and time, place, and manner contexts, where, as just discussed, it is now well established that a least-restrictive-means standard does not apply, we have sometimes used the same sort of "necessity" language which is the asserted precedential authority for that standard in commercial speech cases. For example, in *United States v. O'Brien,* 391 U. S. 367, 376-377 (1968), we stated that restrictions on expressive conduct must be "no greater than essential." And in *City*

None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive, disregarding "far less restrictive and more precise means." *Shapero v. Kentucky Bar Assn.*, 486 U. S., at 476. See, *e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985); *In re R. M. J.*, 455 U. S. 191 (1982); *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977). On the other hand, our decisions *upholding* the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) "not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it." 478 U. S., at 344. Rather, we said that it was "up to the legislature to decide" that point, so long as its judgment was reasonable. Ibid. Similarly, in *Metromedia, Inc. v. San Diego*, 453 U. S., at 513 (plurality opinion), where we upheld San Diego's complete ban of off-site billboard advertising, we did not inquire whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the city's concerns for traffic safety and esthetics. It was enough to conclude that the ban was "perhaps the only effective approach." *Id.*, at 508. And in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U. S., at 539, it was enough to uphold the restrictions placed on commercial speech by a federal trademark statute that they were "not broader than Congress reasonably could have determined to be necessary."

Council of Los Angeles v. Taxpayers for Vincent, 466 U. S. 789, 810 (1984), we sustained the time, place, and manner restriction because it "curtail[ed] no more speech than [was] necessary to accomplish its purpose."

In sum, while we have insisted that " 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful,' " *Shapero, supra,* at 478, quoting *Zauderer,* 471 U. S., at 646, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas, supra,* at 341—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," *In re R. M. J., supra,* at 203; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

We reject the contention that the test we have described is overly permissive. It is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. See, *e.g., Railway Express Agency, Inc. v. New York,* 336 U. S. 106, 109-110 (1949). There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see *Zauderer, supra,* at 647, it must affirmatively establish the reasonable fit we require. By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) "traditionally subject to governmental regulation," *Ohralik v. Ohio State Bar Assn.,* 436 U. S., at 455-456. Far from eroding the essential protections of the First Amendment, we think this disposition

strengthens them. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.*, at 456.

III

Finally, we must address respondents' objection that, even if the principal First Amendment interests they asserted involve commercial speech and have not improperly been restricted, Resolution 66-156 must nonetheless be invalidated as overbroad, since it prohibits as well fully protected, *non*-commercial speech. Although it is true that overbreadth analysis does not normally apply to commercial speech, see *Bates v. State Bar of Arizona, supra,* at 380-381; *Ohralik, supra,* at 462, n. 20; *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U. S. 489, 496-497 (1982), that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground—our reasoning being that commercial speech is more hardy, less likely to be "chilled," and not in need of surrogate litigators. See *Bates v. State Bar of Arizona, supra; Ohralik v. Ohio State Bar Assn., supra.* Here, however, although the principal attack upon the resolution concerned its application to commercial speech, the alleged overbreadth (if the commercial-speech application is assumed to be valid) consists of its application to *non*commercial speech, and that is what counts. Cf. *Bigelow v. Virginia,* 421 U. S. 809, 815-819 (1975); *Hoffman Estates v. The Flipside, Hoffman Estates, Inc., supra,* at 495-497.

On the record before us here, Resolution 66-156 must be deemed to reach some noncommercial speech, A stipulation entered into by the university stated that the resolution reaches any invited speech "where the end result is the intent to make a profit by the invitee." App. 87. More specifically, a SUNY deponent authorized to speak on behalf of the university under Federal Rule of Civil Procedure 30(b)(6) testified that the resolution would prohibit for-profit job counseling in the dormitories, *id.,* at 133; and another SUNY official testi-

fied that it would prohibit tutoring, legal advice, and medical consultation provided (for a fee) in students' dormitory rooms, see *id.*, at 162, 181-183. While these examples consist of speech for a profit, they do not consist of speech that *proposes* a commercial transaction, which is what defines commercial speech, see *Virginia Pharmacy Board,* 425 U. S., at 761 (collecting cases). Some of our most valued forms of fully protected speech are uttered for a profit. See, *e. g., New York Times Co. v. Sullivan,* 376 U. S. 254 (1964); *Buckley v. Valeo,* 424 U. S. 1 (1976) *(per curiam).*

In addition to being clear about the difference between commercial and noncommercial speech, it is also important to be clear about the difference between an as-applied and an overbreadth challenge. Quite obviously, the rule employed in as-applied analysis that a statute regulating commercial speech must be "narrowly tailored," which we discussed in the previous portion of this opinion, prevents a statute from being overbroad. The overbreadth doctrine differs from that rule principally in this: The person invoking the commercial-speech narrow-tailoring rule asserts that *the acts of his that are the subject of the litigation* fall outside what a properly drawn prohibition could cover. As we put it in *Ohralik v. Ohio State Bar Assn.,* 436 U. S., at 462, he "attacks the validity of [the statute] not facially, but as applied to his acts of solicitation," whereas the person invoking overbreadth "may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to, him," *id.,* at 462, n. 20. Thus in *Bates,* the case that established the nonapplicability of overbreadth analysis to commercial speech, we said that appellants could not "expect to benefit [from the statute's overinclusiveness] regardless of the nature of their acts," 433 U. S., at 380, and framed as the relevant question "Is . . . *appellants' advertisement* outside the scope of basic First Amendment protection?" *id.,* at 381 (emphasis added). Where an overbreadth attack is successful, the statute is obviously invalid in *all* its applications, since every person to whom it is applied can defend on the basis of the same overbreadth. A successful attack upon a commercial-speech restriction on narrow-tailoring grounds, by contrast, does not assure a defense to those whose own com-

mercial solicitation *can* be constitutionally proscribed—though obviously the rationale of the narrow-tailoring holding may be so broad as to render the statute effectively unenforceable. See, *e. g., Central Hudson Gas & Electric Corp. v. Public Service Common of New York,* 447 U.S. 557 (1980); *Shapero v. Kentucky Bar Assn.,* 486 U. S. 466 (1988).

Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to *someone else.* Respondents' invocation of the doctrine in the present case is unusual in that the asserted extensions of Resolution 66-156 beyond commercial speech that are the basis for their overbreadth challenge are not hypothetical applications to third parties, but applications to the student respondents themselves, which were part of the subject of the complaint and of the testimony adduced at trial. Perhaps for that reason, the overbreadth issue was not (in the District Court at least) set forth in the normal fashion—viz., by arguing that even if the commercial applications of the resolution are valid, its non-commercial applications are not, and this invalidates its commercial applications as well. Rather, both commercial and (less prominently) noncommercial applications were attacked on their own merit—with no apparent realization, we might add, on the part of either respondents or the District Court, that separate categories of commercial speech and noncommercial speech, rather than simply various types of commercial speech, were at issue.

The First Amendment doctrine of overbreadth was designed as a "departure from traditional rules of standing," *Broadrick v. Oklahoma,* 413 U. S. 601, 613 (1973), to enable persons who are themselves unharmed by the defect in a statute nevertheless "to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court," *id.,* at 610. We see no reason, however, why the doctrine may not be invoked in the unusual situation, as here, where the plaintiff has *standing* to challenge *all* the applications of the statute he contends are unlawful, but his challenge to *some* of them (here, the commercial applications of the statute, assuming for the moment they are valid) will fail unless the doctrine of overbreadth is

invoked. It would make little sense to reject these plaintiffs' as-applied attack upon the statute's restriction of commercial speech (on the ground that in its commercial-speech applications the statute *is* narrowly tailored) and to preclude them from attacking that restriction on grounds that the statute is overbroad (because they have standing to attack its overbroad applications directly and therefore cannot invoke the overbreadth doctrine) — and then, next week, to permit some person whose noncommercial speech is *not* restricted (so that he has no standing to attack that aspect of the statute directly) to *succeed* in his attack on the commercial applications because the statute is overbroad. In other words, while the overbreadth doctrine was born as an expansion of the law of standing, it would produce absurd results to limit its application strictly to that context.

It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial*, not only as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma, supra,* at 615, and therefore requires consideration of many more applications than those immediately before the court. Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.

In the present case, it has not yet been properly determined that the restrictions on respondents' commercial speech are valid as applied. In fact, neither the legal issues nor the factual questions involved in that portion of the case have been separately addressed by either of the courts below. As we have described, the District Court held that the restrictions

on both types of speech were valid without specifically considering (or apparently even recognizing the presence of) noncommercial speech; and the Court of Appeals reversed, again without separate analysis of noncommercial speech, for failure to apply the least-restrictive-means test — which, as we have held, was error. We decline to resolve those as-applied challenges here, not only for reasons of economy but also because a holding for respondents would produce a final judgment in their favor, according them more relief than they obtained from the Court of Appeals (which entered only a remand). Such a result is generally impermissible where, as here, respondents have not filed a cross-petition for certiorari. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 382-387 (6th ed. 1986). For the same reasons and indeed *a fortiori,* we decline to resolve here the issue normally subsequent to rejection of the as-applied challenge, whether the statute is overbroad. We remand this case for determination, pursuant to the standards described above, of the validity of this law's application to the commercial and noncommercial speech that is the subject of the complaint; and, if its application to speech in either such category is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.

* * *

The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The majority holds that "least-restrictive-means" analysis does not apply to commercial-speech cases, a holding it is able to reach only by recasting a good bit of contrary language in our past cases.[1] I would have preferred to leave the least-

1. The majority concedes that it must repudiate the Court's repeated assertion that regulation of commercial speech may be "not more extensive than is necessary to serve [a substantial governmental] interest" in order to decide that "least-restrictive means" analysis does not apply to commercial-

restrictive-means question to another day, and dispose of the case on the alternative—and, in this case, narrower—ground of overbreadth.[2] While respondents failed to file a cross-petition on the issue, this omission is not a jurisdictional barrier, see *Berkemer v. McCarty,* 468 U. S. 420, 435-436, n. 23 (1984), and is more than outweighed by the opportunity the overbreadth claim affords to avoid a substantial revision of the Court's precedents in the area of commercial speech.

That Resolution 66-156 is substantially overbroad in its potential application to noncommercial speech is readily apparent. As the university interprets the resolution, any speech in a dormitory room for which the speaker receives a profit is speech by a "private commercial enterprise," prohibited by the resolution. See ante, at 482-483. As the majority correctly observes, *ante,* at 482, the resolution so interpreted prohibits not only commercial speech (i. e., speech proposing a commercial transaction), but also a wide range of speech that receives the fullest protection of the First Amendment. We have been told by authoritative university officials that the resolution prohibits a student from meeting with his phy-

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NOTES *(Continued)*

speech cases. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U. S. 557, 566 (1980); see *ante,* at 476-477. Indeed, to reach its result, the majority must characterize as "dicta" the Court's reference to "least-restrictive means" analysis in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S. 626, 644 (1985), see *ante,* at 476, although this reference seems integral to the Court's holding that the ban on attorney advertising at issue there was not "necessary to the achievement of a substantial governmental interest."

2. Although at times we have suggested that as-applied challenges should be decided before overbreadth challenges, see *Brockett v. Spokane Arcades, Inc.,* 472 U. S. 491 (1985), we have often felt free to do otherwise, see *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987); *Houston v. Hill,* 482 U. S. 451 (1987). Here, the Court has a choice between deciding the general question whether "governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end," *ante,* at 471, and the specific question whether this particular resolution is void because of unconstitutional overbreadth. Surely, the former question is the more sweeping one in terms of constitutional law.

sician or lawyer in his dorm room, if the doctor or lawyer is paid for the visit. We have similarly been told that the resolution prohibits a student from meeting with a tutor or job counselor in his dorm room. *Ibid.* Presumably, then, the resolution also forbids a music lesson in the dorm, a form of tutoring. A speech therapist would be excluded, as would an art teacher or drama coach.

A public university cannot categorically prevent these fully protected expressive activities from occurring in a student's dorm room. The dorm room is the student's residence for the academic term, and a student surely has a right to use this residence for expressive activities that are not inconsistent with the educational mission of the university or with the needs of other dorm residents (the distinction between tuba lessons and classical guitar lessons, or between drawing lessons and stone sculpture lessons, comes immediately to mind). See *Tinker v. Des Moines Independent Community School District,* 393 U. S. 503 (1969); cf. *Kovacs v. Cooper,* 336 U. S. 77 (1949). It cannot plausibly be asserted that music, art, speech, writing, or other kinds of lessons are inconsistent with the educational mission of the university, or that a categorical prohibition of these activities is the "least-restrictive means" (or is even "narrowly tailored") to protect the interests of other dorm residents. Nor is there any possible basis for believing that in-dorm psychological or vocational counseling is incompatible with the university's objectives or the needs of other residents. Thus, the broad reach of Resolution 66-156 cannot be squared with the dictates of the First Amendment.

More important, the resolution's overbreadth is undoubtedly "substantial" in relation to whatever legitimate scope the resolution may have. See *Houston v. Hill,* 482 U. S. 451, 458 (1987); *Board of Airport Commr's of Los Angeles v. Jews for Jesus, Inc.,* 482 U. S. 569, 574 (1987). Even assuming that the university may prohibit *all* forms of commercial speech from a student's dorm (a proposition that is by no means obvious

under our precedents),[3] the resolution's impermissible restrictions upon fully protected speech amount to a considerable portion of the resolution's potential applications. Because the resolution makes no effort to distinguish between commercial and noncommercial speech, or to narrow its scope to the perceived evil it was intended to address, see *Thornhill v. Alabama,* 310 U. S. 88, 97 (1940), it sweeps within its reach far more protected expression than is tolerable under the First Amendment.

In this respect, the resolution here is equivalent to the one struck down on overbreadth grounds in *Jews for Jesus, supra,* a resolution that banned all "First Amendment activities" within the central terminal area of a major urban airport. By prohibiting all speech in a dorm room if the speaker receives a fee, the resolution in this case, like the resolution in *Jews for Jesus,* indiscriminately proscribes an entire array of wholly innocuous expressive activity, and for that reason is substantially overbroad. I therefore would hold Resolution 66-156 unconstitutional on its face now, in order to avoid chilling protected speech during the pendency of proceedings on remand.

---

3. For example, it is highly doubtful that the university could prohibit students from inviting to their rooms a representative from a birth-control clinic, from whom the students seek information about services the clinic provides for a fee. Cf. *Bigelow v. Virginia,* 421 U. S. 809, 822 (1975).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of September, one thousand nine hundred and eighty-nine.

Present:
HON. JAMES L. OAKES,
Chief Judge
HON. RICHARD J. CARDAMONE,
HON. J. DANIEL MAHONEY,
Circuit Judges.

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, and AMERICAN FUTURE SYSTEMS, INC.
Plaintiffs,

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, and JACLYN BERNSTEIN,
Appellants,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of THE COLLEGE AT CORTLAND, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMPKIN, individually and as President of THE COLLEGE OF ARTS AND SCIENCES AT POTSDAM,
Appellees.

UNITED STATES COURT OF APPEALS
FILED
SEP 25 1989
SECOND CIRCUIT

Docket No: 87-7296

ORDER

In light of the Supreme Court's determination and remand, we hereby order that the above entitled case is remanded to the United States District Court for the Northern District of New York for determination pursuant to the standards described in the Supreme Court's opinion of the validity of the application of the regulations to the commercial and noncommercial speech that is the subject of the complaint and, if its application to speech in either such category is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable. *See* 57 U.S.L.W. 5015, 5020 (U.S. June 29, 1989).

/s/ James L. Oakes
James L. Oakes,
Chief Judge.

/s/ Richard J. Cardamone
Richard J. Cardamone,

/s/ J. Daniel Mahoney
J. Daniel Mahoney,
Circuit Judges.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject.

Fed. R. Civ. P. 1

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 15

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after

service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Fed. R. Civ. P. 21

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

(2)

No. 94-1819

Supreme Court, U.S.
FILED
JUN 2 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Petitioners,

against

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement of Questions Presented

1. Whether this Court should grant certiorari to review a decision of the United States Court of Appeals for the Second Circuit, holding that because plaintiffs, former students at the State University of New York ("SUNY") who challenged a SUNY regulation as an infringement of their First Amendment rights as students, are no longer affiliated with SUNY, their case is moot, when the decision below was based on the well-established principles that the mootness doctrine is constitutional in nature, that a case's mootness deprives a federal court of subject matter jurisdiction, and that students who challenge a regulation of an academic institution with which they are no longer affiliated lack a personal stake in the outcome of the litigation, which is therefore moot.

2. Whether this Court should grant certiorari to review a decision of the United States Court of Appeals for the Second Circuit, which affirmed the district court's dismissal of this action on the ground of mootness, when the plaintiffs, former students challenging a regulation of a university with which they have had no affiliation for more than six years, have no continuing stake in the outcome of the case, which has not yet been resolved on its merits and has remained before the federal courts solely because plaintiffs' counsel are seeking attorney's fees pursuant to 42 USC § 1988.

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No. 94-1819

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Petitioners,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Resolution 66-156 of the Board of Trustees of the State University of New York ("SUNY") prohibits the "operat[ion]" of "private commercial enterprises" on SUNY campuses (206).[1] American Future Systems, Inc. ("AFS") is a Pennsylvania corporation engaged in selling cookware, china and tableware to college students through group demonstrations of its products in college and university dormitory rooms (258). In October 1982, AFS representative Kathy Rapp ("Rapp"), in the process of consummating sales after a dormitory-room demonstration of AFS products at SUNY-Cortland, was asked to leave by campus authorities. When she refused, she was arrested (218-19). Subsequently, Todd Fox ("Fox"), a SUNY-Cortland student, sought and was denied permission to host an AFS demonstration (39-40).

On December 2, 1982, AFS, Rapp and Fox commenced this action pursuant to 42 USC § 1983 in the United States District

---

[1]Parenthetical citations are to the Joint Appendix submitted by the parties in the court below.

Court for the Northern District of New York, naming as defendants SUNY-Cortland, the SUNY Board of Trustees, and five individuals affiliated with SUNY-Cortland (20, 22-23). Plaintiffs sought declaratory and injunctive relief and contended, *inter alia,* that they had been deprived of their "right to freedom of speech" under the First Amendment (29-30). On June 3, 1983, the District Court (McCurn, J.) preliminarily enjoined SUNY from enforcing Resolution 66-156 by barring group product demonstrations in dormitory rooms. *American Future Systems, Inc. v State University of New York College at Cortland,* 565 F Supp 754 (NDNY 1983) (174).

On August 28, 1984, plaintiffs filed an amended complaint, naming as additional plaintiffs certain students at SUNY-Cortland and SUNY-Albany, and adding as defendants SUNY-Potsdam, SUNY-Albany, SUNY-Binghamton and the Presidents of those three institutions (46-49). Rapp thereafter withdrew as a plaintiff. On December 23, 1985, plaintiffs moved pursuant to Fed R Civ P 15 and 21 to amend their complaint again, now seeking to add certain plaintiffs, drop certain defendants, and add and withdraw allegations (77). In an affidavit accompanying the motion, plaintiffs' counsel explained that he proposed to add students from SUNY-Cortland and SUNY-Albany "as student plaintiffs so that they may preserve and continue to litigate the student-related issues already raised in this action against" those institutions (79, 80). The District Court granted plaintiffs' motion to amend the complaint on January 7, 1986.

The case was tried without a jury during September and October, 1986. On December 12, 1986, the District Court dissolved its preliminary injunction and upheld SUNY's regulation, applying a "public forum" analysis to the case and treating the regulation as a valid effort to preserve public property in the face of an incompatible use. *Fox v Board of*

Trustees of the State University of New York, 649 F Supp 1393 (NDNY 1986) (84). The student plaintiffs only, and not AFS, appealed to the United States Court of Appeals for the Second Circuit. On March 11, 1988, the Second Circuit, in a 2-1 decision, reversed the decision of the District Court and remanded the case to that court, rejecting the public forum analysis and instead analyzing the SUNY regulation as a government restriction on commercial speech. 841 F2d 1207 (2d Cir 1988) (106). According to the Second Circuit, such a restriction was constitutionally required to be the "least restrictive means" of achieving SUNY's purpose (110-113).

On October 3, 1988, this Court granted defendants' petition for a writ of certiorari. 488 US 15 (1988). An inquiry by SUNY's counsel at the time the petition was granted revealed that at least one student plaintiff was currently registered at SUNY (584). On the same day certiorari was granted, the District Court issued a decision on remand, invalidating Resolution 66-156 as "not the least restrictive means for meeting the proffered state interests" (175, 183-84). 695 F Supp 1409 (NDNY 1988). Defendants then moved in the District Court pursuant to Fed R Civ P 52 and 59 to amend the District Court's findings of fact and its judgment. On November 23, 1988, the District Court issued an order staying all proceedings until after this Court had acted.

On June 29, 1989, this Court reversed the Second Circuit's judgment and remanded the case for further proceedings. 492 US 490 (1989) (76a).[2] The Court found that its prior decisions upholding government regulation of commercial speech could not "be reconciled with a requirement of least

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[2]Parenthetical citations followed by "a" are to the Appendix to the Petition for Writ of Certiorari.

restrictive means" (86a). The Court remanded the case to the Second Circuit for determination of the validity of the SUNY regulation both as applied and in terms of overbreadth (418). On September 25, 1989, the Second Circuit in turn remanded the case to the District Court (422).

At the time of this remand to the District Court, counsel for defendants learned that none of the plaintiffs was a SUNY student any longer and thus that the case had become moot (584-85). Defendants' brief on remand called this fact to the District Court's attention. Plaintiffs' brief on this subject contained a footnote "request[ing] leave to amend their complaint to join as plaintiffs" four students who were currently enrolled at SUNY. On May 24, 1991, the District Court issued a memorandum-decision and order concluding that the case was moot and that it did not fit within the exception to the mootness doctrine for matters capable of repetition but evading review, but granting plaintiffs leave to amend their complaint pursuant to Fed R Civ P 15(a). 764 F Supp 747 (NDNY 1991) (54a). Plaintiffs accordingly filed an amended complaint naming current SUNY students as plaintiffs (454).

Defendants moved in the District Court for reconsideration of the court's order permitting amendment of the complaint. On May 7, 1993, the District Court issued an opinion reaffirming its conclusion that the case was moot, finding that its 1991 decision was otherwise "in clear error," rejecting plaintiffs' suggestion that the complaint could be amended pursuant to either Fed R Civ P 15 or 21 to add new plaintiffs, and dismissing the complaint. 148 FRD 474 (NDNY 1993) (23a). With respect to Rule 21, which deals with nonjoinder and misjoinder, the District Court opined that the rule was "not enacted as a means for a party to avoid dismissal on mootness grounds," for "[i]f that were so, no case would ever become moot," "thus rendering the

mootness doctrine a legal fiction" (43a-47a). As to Rule 15, the District Court overturned its prior grant of leave to amend, noting that the rule "allows only a 'party' to amend 'the party's pleading,' " but that "the original plaintiffs are no longer 'parties' to this action because the case has become moot as to them," such that "the court lacks jurisdiction" and is "without power to act" (49a-50a). Plaintiffs' motion for reconsideration of the District Court's entry of judgment for defendants was denied on June 23, 1993 (588).

Plaintiffs then appealed to the Second Circuit, which on December 9, 1994 issued a decision affirming the District Court's judgment. 42 F3d 135 (2d Cir 1994) (6a). The court first rejected plaintiffs' argument that defendants had "waived" their right to assert a defense based on mootness. As the Second Circuit noted, this "argument ignores the jurisdictional nature of the Article III requirement that federal courts adjudicate only 'Cases' and 'Controversies' " (14a). When a case becomes moot, the court below observed, federal courts lack subject matter jurisdiction over the action, and "[d]efects in subject matter jurisdiction cannot be waived and may be raised at any time during the proceedings" (15a). Because the plaintiffs had departed SUNY, "[t]he relief sought in the Complaint could provide no legally cognizable benefits to Plaintiffs," "th[e] case was moot," and the District Court lacked subject matter jurisdiction (16a).

The Second Circuit next considered and rejected the several arguments by which plaintiffs sought to circumvent the mootness of their case. The failure of the complaint to request nominal damages or anything other than declaratory and injunctive relief meant that plaintiffs' newly-asserted claim for nominal damages did not "suffice to avoid mootness when [their] claims for injunctive and declaratory relief have become

moot" (18a-19a). Nor, said the court below, could plaintiffs keep their moribund case alive by contending that they are "litigating in a representational capacity" on behalf of other SUNY students (19a). They had neither conducted the case as a class action nor otherwise "explicitly asserted [in the pleadings] that [they] were acting in a representative capacity on behalf of themselves and other students similarly situated" (19a-20a).

The case likewise did not fall within "the 'capable of repetition, yet evading review' exception to mootness" (20a). The case, said the Second Circuit, did not typically evade review because "there is no reason to believe that the issue presented by this case could not be litigated in the four-year span of a standard undergraduate education," especially "[n]ow that the Supreme Court has defined the applicable rule" to be applied on the merits (20a). Nor did the court below detect a "reasonable expectation" that the case would repeat itself with the present plaintiffs. Although several plaintiffs, none of whom has been affiliated with SUNY since 1988, had sought to supplement the record on appeal with affidavits suggesting that they might return to SUNY "'within the next few years,'" and their motion was denied, in any event this "bare statement of intention [was] insufficient to escape mootness," particularly in view of the fact that "the expressed intention to return to the SUNY system is not solely within plaintiffs' power to accomplish" (21a-22a).[3]

---

[3]Because plaintiffs allude (Petition, pp 6, 19) to "evidence" suggesting that some of them may wish someday to return to SUNY as students, it is necessary to note that there is no such evidence in the record. After they had filed their main brief in the Second Circuit, some plaintiffs sought to supplement the record pursuant to Fed R App P 10(e) with affidavits claiming, as they had not at any earlier point in the litigation, that there was

(Continued on next page.)

Finally, the Second Circuit upheld the District Court's refusal to permit plaintiffs to amend their complaint by adding current SUNY students as plaintiffs. The court validated "the reasons [for this refusal] stated in the thorough analysis of [the] district court in its opinion" (22a). According to the court below, "[t]he district court correctly concluded that once a case is moot, it is no longer justiciable in federal court and must be dismissed," and cannot be kept alive artificially by means of a transfusion of new plaintiffs (22a).

REASONS FOR DENYING THE WRIT

I. The decision below creates no "conflicts" or "confusion" with respect to the mootness doctrine.

Relying on well-established legal principles, the courts below recognized the inescapable fact that, once plaintiffs departed SUNY, their case became moot. Article III, § 2, cl 1 of the Constitution limits the federal "judicial power" to "Cases" and "Controversies." When there is no case or controversy, an action is moot and a federal court lacks subject matter jurisdiction over it. The "confusion" and "conflicts" plaintiffs purport to detect in this area of law, and on which they premise their petition for certiorari, are simply nonexistent.

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[3](Continued from previous page.)
a reasonable probability they would return to SUNY as students. As Judge Mahoney explained, although he granted this motion "prior to oral argument, subject to reconsideration by the panel, as a matter of administrative convenience," the motion was ultimately denied by the panel, for "this evidence is not a proper supplement to the record as contemplated by Fed R App P 10(e)" (21a). "In any event," the court below noted, "consideration of the affidavits would not affect the outcome of this case" (21a).

Plaintiffs' central argument (Petition, pp 8-16) is based on nothing more than a truncated, selective, and therefore inaccurate reading of this Court's decisions. Thus, according to plaintiffs, the question of whether the mootness doctrine is rooted in the constitutional "cases and controversies" requirement or in prudential considerations remains "unresolved" and must now be addressed by this Court. Plaintiffs' sole basis for this contention is the case of *Honig v Doe,* 484 US 305, 317 (1988), in which a six-judge majority noted that "[u]nder Article III of the Constitution this Court may only adjudicate actual, ongoing controversies." Similarly, Justice Scalia, joined by Justice O'Connor in dissent, opined that the mootness doctrine is constitutionally based: "I cannot believe that it is only our prudence, and nothing inherent in the understood nature of 'The judicial Power,' [cit om] that restrains us from pronouncing judgment in a case that" has become moot. 484 US at 341 (Scalia, J. dissenting). Only Chief Justice Rehnquist, concurring in *Honig,* suggested that the mootness doctrine may be rooted in prudential rather than constitutional considerations. 484 US at 329-332 (Rehnquist, C.J., concurring).

As the court below recognized (14a-15a), any conceivable confusion as to the meaning of *Honig* and the constitutional source of the mootness doctrine was resolved by this Court's unanimous rulings in two subsequent cases, neither of which plaintiffs acknowledge. In *Lewis v Continental Bank Corp.,* 494 US 472 (1990), the Court, rejecting any suggestion that mootness is prudential, held squarely that mootness derives from "Article III of the Constitution." 494 US at 477. As the Court explained,

> Article III denies federal courts the power "to decide questions that cannot affect the rights of litigants in the case before them" [cit om], and confines them to

> resolving "'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'"

Id. (cit om). Similarly, in *U.S. Bancorp Mortgage Co. v Bonner Mall Partnership*, ___ US ___, 115 S Ct 386, 389, 130 L Ed 2d 233 (1994), the unanimous court alluded to "the limitations on the judicial power conferred by Article III" and added that federal courts lack authority "to decide the merits of a legal question not posed in an Article III case or controversy."

Thus, notwithstanding the law review articles plaintiffs cite in lieu of jurisprudence, there is no ongoing controversy as to the source of the mootness doctrine in Article III of the Constitution. There is disagreement among law professors, but not among courts. And this in turn means, as the court below recognized, that the absence of a live case or controversy absolutely deprives a federal court of subject matter jurisdiction, regardless of when the defense of mootness is raised by a party or indeed of whether the defense is raised at all.

Nor is there any question as to how the mootness doctrine applies either to this case or more generally to cases discussing what plaintiffs (Petition, p 18) call "the significance of a student plaintiff's graduation from a defendant institution." As the court below understood, it is entirely clear that a student plaintiff's departure, through graduation or otherwise, from a school with which he at one time had a live controversy moots the case. A plaintiff who ceases to be a student retains no personal stake

in the outcome of a suit challenging a school's treatment of its students, and may not maintain such a suit.

Thus, in *Board of School Commissioners of the City of Indianapolis v Jacobs,* 420 US 128 (1975), plaintiffs were students seeking to have certain regulations of the Board declared unconstitutional. By the time of oral argument, all the plaintiffs had graduated. To the Court, this made it "clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue," and the case was therefore moot. 420 US at 129. In other words, the Court subsequently observed, the plaintiffs in *Jacobs* "no longer possessed a personal stake in the outcome at the time the case reached this Court for review." *Franks v Bowman Transportation Co.,* 424 US 747, 754 n.6 (1976). Similarly, in *DeFunis v Odegaard,* 416 US 312 (1974), the plaintiff was shortly to graduate from the law school whose admissions policies originally prompted his suit. Since the plaintiff would therefore not "be affected by any view this Court might express on the merits of this controversy," the Court concluded that it could not "consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties." 416 US at 317, 319-20.

The cases of the courts of appeals, far from embodying the "conflicts" which according to plaintiffs require this Court's intervention in the present case, in fact follow from the decisions in *Jacobs* and *DeFunis.* Thus, there is no conflict in the decisions of the Second Circuit, which in similar circumstances has invariably reached the same conclusions it reached in the present case. *See, Cook v Colgate University,* 992 F2d 17, 19 (2d Cir 1993) (graduation of plaintiffs "before the district court's order can affect them" rendered case moot); *Alexander v Yale University,* 631 F2d 178, 184 (2d Cir 1980) (plaintiffs' gradua-

tion rendered challenge to university's policy moot, for "[n]one of [them] at present suffers from the alleged injury"). These decisions in turn comport with the decisions of other courts of appeals. *See, e.g., McFarlin v Newport Special Sch. Dist.*, 980 F2d 1208, 1210-11 (8th Cir 1992) (claim for reinstatement to basketball team rendered moot by graduation); *Ahmed v University of Toledo*, 822 F2d 26, 28 (6th Cir 1987) (action moot with respect to four named plaintiffs after one graduated and three dropped out); *Wilson v State of Nevada*, 666 F2d 378, 381-83 (9th Cir 1982) (graduation mooted claim); *Williams v Spencer*, 622 F2d 1200, 1204 (4th Cir 1980) (same); *Doe v Marshall*, 622 F2d 118, 119 (5th Cir 1980) (same); *Gomes v Rhode Island Interscholastic League*, 604 F2d 733, 736 (1st Cir 1979) (same).

Nor do the cases plaintiffs cite as creating "conflicts" with the decision below do anything of the sort. There is a well-established exception to the mootness doctrine for cases where "the following two circumstances [are] simultaneously present: '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Lewis*, 494 US at 481 (quoting *Murphy v Hunt*, 455 US 478, 482 (1982)). This exception fit the factual circumstances of *Jones v Illinois Dept. of Rehabilitation Services*, 689 F2d 724, 728 (7th Cir 1982) (case was capable of repetition as to plaintiff, whose return as graduate student to school from which he had graduated was reasonably probable).[4] As was obvious to the courts below, a

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[4]To the extent that *Bender v Williamsport Area School District*, 741 F2d 538, 542 n 4 (3d Cir 1984), *vacated*, 475 US 534 (1986), may have avoided mootness through the Third Circuit's recourse to the possibility that the

(Continued on next page.)

bare claim that plaintiffs might someday return to SUNY for further education after having made no effort to do so 5 1/2 (now 7) years since their last affiliation with the university -- even if such a claim had been properly before the court, rather than asserted untimely on the eve of oral argument via a motion to supplement the record on appeal -- did not create the requisite reasonable expectation that these plaintiffs would again be subject to the university policy of which they complained while students.

The supposed "conflict" between circuits upon which plaintiffs principally base their present petition requires that they boldly disavow their words to this Court in 1988. Plaintiffs at that time aggressively characterized this case as involving only the rights of students to host or attend presentations, not the separate rights of non-student invitees in connection with the same presentations. Thus, they told this Court, "[a]t all times throughout the litigation, the only issue raised was that of the constitutional rights of the students, as invitors, to listen to speech which they wanted to hear" (Respondents' Brief on Writ of Certiorari, p 3). In other words, plaintiffs said, they brought this action "because it is their free speech rights, *not the rights*

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[4](Continued from previous page.)
controversy might be repeated with other parties than the plaintiffs therein, it was plainly wrong, for this Court has made clear that the exception to mootness must apply to "the same complaining party." *Lewis*, 494 US at 481. There is no reason to review the case at bar simply to demonstrate that the court below employed the proper standard. In any event, the Third Circuit's judgment in *Bender* was vacated on the ground that the appellant in the circuit court lacked standing, leaving the Third Circuit both "without jurisdiction to hear the appeal" and "without authority to decide the merits." 475 US at 549. Accordingly, the Third Circuit's decision in that case has no precedential value and cannot "conflict" with any other decision of any court.

of their [non-student] invitees, that have been infringed" (Brief for Respondents on the Merits, p 1) (emphasis supplied).

Now, seven years later, the same parties in the same case purport to detect a conflict between the decision below and *Washegesic v Bloomingdale Public Schools,* 33 F2d 679 (6th Cir 1994), *cert. denied,* ___ US ___, 115 S Ct 1822, ___ L Ed 2d ___ (1995). In *Washegesic,* the Sixth Circuit concluded that a former high school student who objected on Establishment Clause grounds to display of a portrait of Jesus Christ in a school hallway retained the capacity to sue the school district despite having graduated, for "the portrait of Jesus affects students and non-students alike" and the plaintiff "still visits the school and will confront the portrait whenever he is in the hall." 33 F3d at 681. As the court below recognized (22a n 5), *Washegesic* is distinguishable, for in the present case both plaintiffs' standing and their substantive claims have been predicated throughout solely on their status as SUNY students, not on their asserted role as non-student visitors to SUNY campuses. Plaintiffs can certainly now bring an action, of course involving a wholly different set of First Amendment issues, based on their status as visitors. But that is not the case they actually brought. Once they lost their status as students, that case became moot.

Nor are there judicial conflicts or uncertainties concerning what plaintiffs call (Petition, p 21) "the representative action exception to the doctrine of mootness." As plaintiffs evidently conceive of this "exception," it is a class action manqué, permitting a plaintiff to forego all the procedural requirements of Fed R Civ P 23, while still forestalling mootness when the named plaintiff ceases to have a stake in the outcome of the case. According to plaintiffs (Petition, p 25), whenever "leaders in student government" sue their schools, they are representing

all student bodies present and future, even if they do not bother to mention this fact to the courts.[5] Nothing this Court has ever said authorizes such an action, which of course would render the class action procedures established by the Federal Rules entirely superfluous. *See, Jacobs,* 420 US at 130 (dismissing case brought on "behalf of all high school students attending Indianapolis public schools" because class was never properly defined or certified). Indeed, in *Pasedena City Bd. of Educ. v Spangler,* 427 US 424 (1976), the original student plaintiffs had graduated. Plaintiffs' counsel suggested that the case be regarded as a *de facto* class action. This, said the Court,

> overlook[s] the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. And while counsel

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[5]Even on their own terms, plaintiffs are mistaken, for by their accounts they were suing on their own behalf. Stephanie Vaiano "felt that the [regulation] was an infringement on my rights" (234). Edward Detweiler joined the case because the regulation "infringes on my right of speech" (262). James Cullen "became very interested in the case because of th[e] infringement upon my rights" (263). Steven Gawley "decided before [he] became a plaintiff" that "this was a right that I would be interested in having" (252). Jeffrey Zellan "simply felt that I should be able to invite guests that I choose to invite" (270). Philip Botwinik felt that "the right to be able to do whatever I want within my own room * * * is very important" (264). And Botwinik's additional concern with the "constitutional rights of students" is insufficient under any circumstances to mark the suit as brought in a representational capacity, even if there were any reason to imagine Botwinik was empowered to do so. He could not have been, for he was just a man who "was very active in the student government" (264). Whatever this may mean, it is not enough to entitle him to represent all SUNY students, present and future.

> may wish to represent a class of unnamed individuals still attending the Pasedena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation.

427 US at 430.

If the expedient of a "representative action" were ever appropriate, *Spangler* would have been the place to employ it. Instead, this Court rejected such a device, in terms unmistakably applicable to the case at bar. As in *Spangler*, the present plaintiffs no longer have a stake in the outcome of the litigation. It is their counsel who "wish to represent" others with an assertedly "substantial interest in the outcome." But as in *Spangler*, counsel's search for clients is not a sufficient reason to prolong, in the form of a "representative action," a moot case that has not been certified or even brought as a class action.

Moreover, even if such a "representative" action is viable under some circumstances, *cf. Trachtman v Anker*, 563 F2d 512 (2d Cir 1977), *cert denied*, 435 US 925 (1978), there is no question that, as the court below recognized, plaintiffs cannot keep the representative nature of the action to themselves until their case becomes moot and it suits them to reveal it. At no point before 1989 did plaintiffs, either in their pleadings or anywhere else, suggest that they were suing on anyone's behalf but their own. Indeed, the very parties whom plaintiffs claim to have represented -- the Student Associations at SUNY-Albany and SUNY-Cortland -- filed *amicus* briefs on the merits in the Second Circuit in 1988, proving rather definitively that these student associations did not view plaintiffs as their proxies.

Thus, the supposed "conflicts" and "confusions" which according to plaintiffs justify a writ of certiorari in this case are completely nonexistent. There is no doubt that the mootness doctrine is grounded in Article III of the Constitution, that the doctrine applies to foreclose litigation between students and their school after the students have departed the institution, that the exception to the mootness doctrine for actions that are capable of repetition yet typically evade review does not apply to students who have had no affiliation with their schools for many years and demonstrate no reasonable likelihood of returning, and that a plaintiff cannot avoid mootness by eschewing a class action but asserting, in the face of a challenge for mootness, that his case has been maintained *sub silentio* as a "representative action" on behalf of others. The decisions of the courts below did no more then apply these well-established principles to the case at bar. There is no need for this Court to grant plaintiffs' petition merely to restate these principles.

II. The Mootness Doctrine was properly applied to this case.

Eschewing the necessary rigorous demonstration of circumstances justifying a grant of their petition, plaintiffs instead devote a substantial portion of their petition (pp 22-29) to elaborate special pleading, contending that the mootness doctrine should not have been applied to their demonstrably moot case. All they accomplish with this special pleading is a persuasive showing that the courts below were correct: this case presents a textbook example of mootness, and any result other than dismissal on mootness grounds would have worked the "inequities" of which plaintiffs complain.

Plaintiffs misunderstand the doctrine of mootness, imagining it can be ignored by federal courts that find it convenient to do so. As demonstrated in the preceding section, that is simply

untrue: a court lacks jurisdiction over a case that becomes moot, regardless of the stage of the litigation at which mootness arises. Thus, as a unanimous Court put it in *Lewis v Continental Bank Corp.*, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." 494 US at 478. If plaintiffs were correct in arguing (Petition, pp 23-24) that, once having accepted jurisdiction over a case, as this Court did the present case in 1989, the case can never have become moot, the result in *Rhodes v Stewart,* 488 US 1 (1988), could not have occurred. Although the Court in *Rhodes* did not realize the fact when it first remanded the case in 1983, it was moot at that time. 488 US at 3. In 1988, reversing the District Court's opinion on remand that the plaintiffs were prevailing parties, the Court noted that "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever." *Id.* In other words, dismissal after remand is exactly what should occur in a moot case that has been heard by this Court. Indeed, even when this Court has granted a petition for certiorari and "received briefing on the merits," a turn of events that renders further proceedings academic "moot[s] the case" and deprives the Court of jurisdiction to decide it on its merits. *U.S. Bancorp Mortgage Co.,* 115 S Ct at 389 (case rendered moot by settlement agreement).

Plaintiffs further betray their misunderstanding of the mootness doctrine in their contention (Petition, pp 24-25) that the case cannot be moot because SUNY was "on notice of the facts supporting its mootness claim" before this Court's decision in 1989 and thus asserted the claim "belated[ly]" after remand to the District Court. As a simple matter of fact, the contention is false: as demonstrated in the record, to the best of defendants' knowledge the case was still viable in late 1988 and early 1989; when, after remand, defendants learned of the case's mootness, they brought it promptly to the District Court's attention. But

quite apart from this, plaintiffs overlook both the nature of mootness as a legal principle and the duties that the possibility of mootness imposes on all parties to a litigation. Because mootness is, as discussed above, a jurisdictional prerequisite, it cannot be waived or abandoned by a party. Indeed, it can be invoked *sua sponte* by a court even if the parties overlook it. Thus, there is no such thing as a "belated" claim of mootness. If a case is moot -- even if it has been sc for some time before the parties or the court realizes it -- it is over.

Moreover, as this Court has made clear, the obligation to apprise a court of the mootness of a case rests on all parties. Thus, for example, "when a development after this Court grants certiorari or notes probable jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court *without delay.*" *Board of License Commissioners v Pastore,* 469 US 238, 240 (1985) (emphasis in original). Plaintiffs (unlike defendants) presumably knew that they were no longer affiliated with SUNY as of September 1988. By their own reasoning, it is as easy to argue that they wrongfully suppressed knowledge of the case's mootness as that SUNY asserted the defense "belatedly." But no such argument is necessary, for the point of the mootness doctrine is to prevent courts from doing needless work -- an object which does not depend on a party's assertion, "timely" or otherwise, of a mootness claim.

Nor, having failed to employ "[t]wo simply procedural expedients to avoid mootness" (Petition, pp 25-27) when they might have kept this action alive, can plaintiffs now request this Court to exercise these procedures retroactively to resuscitate their long-dead case. As noted above, having eschewed a class action lawsuit and having failed at any point before the case

became moot to indicate that they were representing anyone's interests but their own, plaintiffs cannot now rescue their case with the *deus ex machina* of a "representative capacity" suit. Similarly, having failed to amend their complaint to add new parties with an ongoing stake in the litigation at a time while the case was still viable, plaintiffs cannot now correct this shortcoming. Plaintiffs' counsel understood well both the dangers of mootness in non-class actions involving students and the means by which these pitfalls could be avoided. In 1985, before trial, they sought and were allowed to amend the complaint to add many of the present plaintiffs "as student plaintiffs so that they may preserve and continue to litigate the student-related issues already raised in this action." Their unaccountable failure to seek any further such amendment has rendered this case moot for roughly half its existence.

Nor, as the courts below understood, are the procedures on which plaintiffs would rely to rescue their case from mootness (Petition, p 25) at all suited to belated amendment of a complaint. Fed R Civ P 21 addresses only "Misjoinder and Non-joinder of Parties." As the Second Circuit has noted, this Rule "was adopted to obviate the harsh common law adherence to the technical rules of joinder [cit om], and not in order to deal with problems of defective federal jurisdiction." *Kerr v Compagnie De Ultramar,* 250 F2d 860, 864 (2d Cir 1958). The rule cannot be used to obtain federal jurisdiction by substitution of parties where none otherwise exists. *See, e.g., Graves v Walton County Bd. of Educ.,* 686 F2d 1135, 1138 (5th Cir 1982) (in absence of a class action, a case in which student plaintiffs have all graduated is moot and presents "no viable action" to which proposed new plaintiffs can be added under Rule 21); *Field v Volkswagenwerk AG,* 626 F2d 293, 306 (3d Cir 1980) (Rule 21 cannot be employed "to substitute a diverse claimant for a non-diverse plaintiff" and thus obtain federal jurisdiction,

for "substitution of parties" is "simply not within the scope of" the Rule).

Similarly, both courts below understood that Fed R Civ P 15(a), which permits only "a party" to "amend a party's pleading," cannot be used to amend a complaint in a moot case. Since the absence of a continuing case or controversy means that a plaintiff lacks standing to invoke a federal court's jurisdiction, *see, Princeton University v Schmid,* 455 US 100, 103 (1982), then once a case has been recognized as moot, it simply does not exist any longer, and its plaintiffs may not keep it alive by substituting new plaintiffs for themselves pursuant to Fed R Civ P 15(a). *See, e.g., Summit Office Park v United States Steel Corp.,* 639 F2d 1278, 1282 (5th Cir 1981) (since original plaintiff's case was moot and thus "there was no plaintiff before the court with a valid cause of action, there was no proper party available to amend the complaint"). Nor, more generally, can Rule 15(a) be used to permit a plaintiff over whose case the District Court lacks subject matter jurisdiction to amend its complaint pursuant to Rule 15(a) to substitute a new party with a viable suit. *See, e.g., Pressroom Unions-Printers League Income Security Fund v Continental Assurance Co.,* 700 F2d 889, 893 (2d Cir), *cert denied,* 464 US 845 (1983) (although a plaintiff may "remedy inadequate jurisdictional allegations," it may not "substitute a new action over which there is jurisdiction for one where it did not exist"). The "procedural expedient" of amendment of a still-viable complaint to add new parties was readily available to and indeed once employed by plaintiffs during the first six years of this litigation. Their inexplicable failure to repeat this well-established and clearly-available device is no reason for the court to intervene now in order to consider the application of inappropriate procedural mechanisms to revive this long-moot action.

Nor, finally, is this Court's review necessary in order to vindicate the right of counsel for the "prevailing party" in cases brought pursuant to 42 USC § 1983 to recover attorney's fees under 42 USC § 1988. Plaintiffs argue (Petition, pp 7-8, 27-28) that certiorari should be granted in order to avoid the supposedly "chilling effect" that a dismissal on the ground of mootness will have "on the private bar's willingness to get involved in such cases." In plaintiff's view, 42 USC § 1988 is the Private Attorneys' Relief Act: in § 1983 cases, the private bar's interest in attorney's fees is so great that an attorney may recover such fees even when his case becomes moot. There is, however, not one shred of legislative history suggesting that Congress, in enacting § 1988, intended that public funds be spent on attorney's fees paid to the private bar in cases that cease to be viable because plaintiffs no longer have a stake in their outcome. Indeed, this Court has commented definitively on the fact that counsel's desire for attorney's fees cannot keep a moot case alive, noting that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis,* 494 US at 480.

While valorizing their own quest for attorney's fees, which has kept their obviously moot case before the courts for the past six years, plaintiffs disparage defendants' efforts to avoid liability for attorney's fees by calling the mootness of the action to the courts' attention. There is, however, nothing either reprehensible or avoidable about the fact that 42 USC § 1988, by making attorney's fees available to prevailing parties, affects the incentives for both sides in civil rights litigation. Plaintiffs purport to be troubled by the fact that this case, which since 1989 has lacked any plaintiff with a stake in its outcome, has survived like a tenacious weed solely on the strength of the

quest of plaintiffs' counsel for attorney's fees.[6] But it is difficult to understand why, if (as plaintiffs claim) "SUNY's real motive" in calling the mootness of the case to the courts' attention is avoidance of liability for attorney's fees, the real motive of plaintiffs or their counsel in prolonging a case that has been moot for more than six years is not equally and solely the recovery of counsel fees. It is certainly not defendants who have "squandered" "judicial resources" by keeping this case alive. The current plaintiffs, having left SUNY long ago, have no stake in the outcome of this litigation. As the court below noted, their successors as SUNY students can count on swift resolution of their claims should they ever trouble to commence a new action. Indeed, if plaintiffs' presumably-available student successors had simply commenced a new action as soon as this case became moot, that action would undoubtedly have been resolved on its merits long ago.

This case, at all times since its remand to the District Court in 1989, has entailed no more than a routine application of the well-established principles of the mootness doctrine. The application of these principles may indeed foreclose any claim by plaintiff's counsel for attorney's fees, but such foreclosure is itself the unquestionable consequence of the mootness of this case. A quest for attorney's fees under 42 USC § 1988, without more, is insufficient to keep a moot case alive. There is no need for this Court to grant review merely to restate this unexceptionable conclusion.

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[6]Plaintiffs (Petition, pp 28-29 n 14) quote a colloquy to this effect during oral argument of the case before the Second Circuit between counsel for defendants and "Judge Winter." Judge Ralph K. Winter, however, was not a member of the Second Circuit panel that held unanimously in defendants' favor. Plaintiffs presumably mean to refer to Judge John M. Walker, Jr.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
June 1, 1995

Respectfully submitted,

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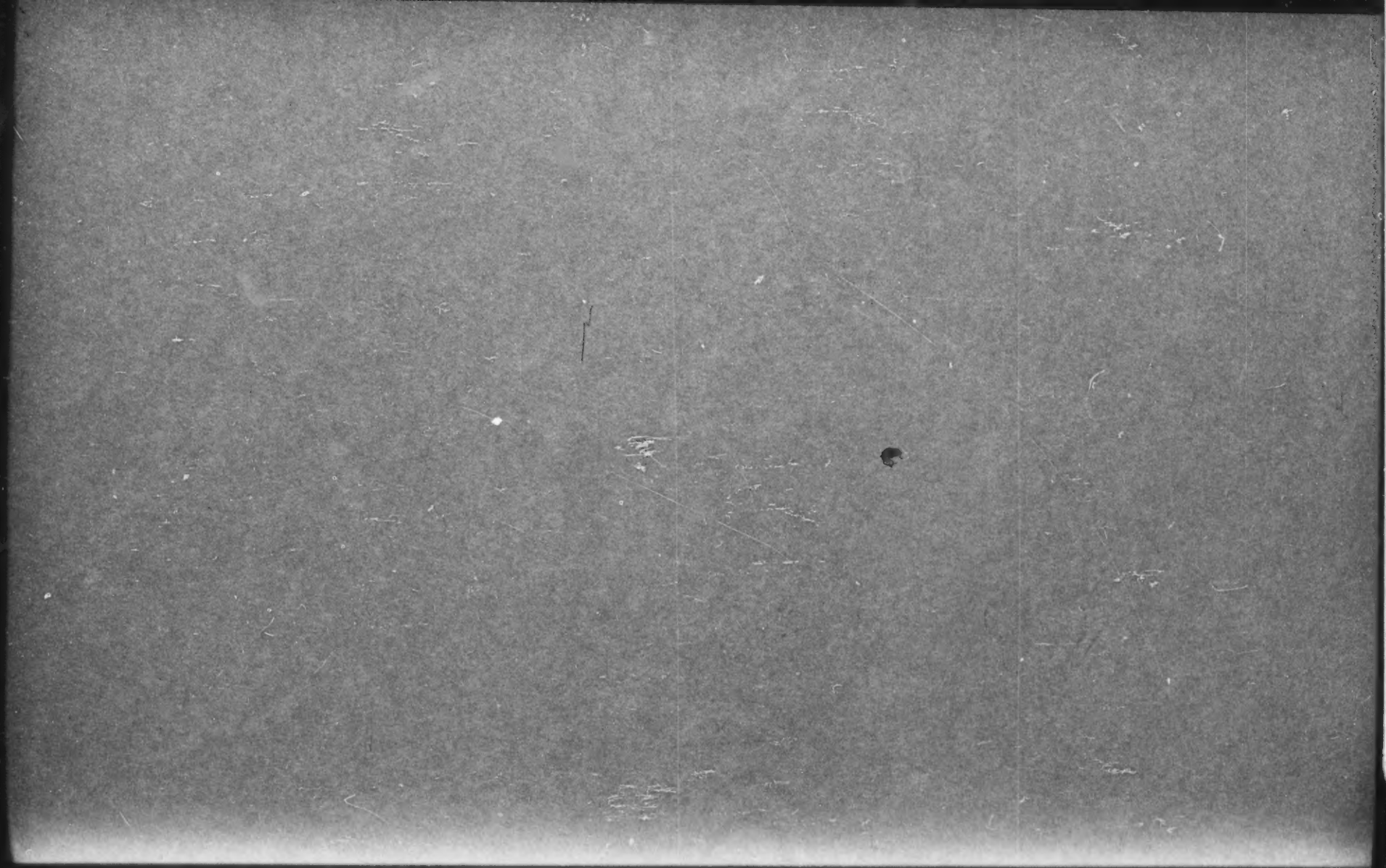

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No. 94-1819

In The

Supreme Court of the United States

October Term, 1994

TODD FOX, *et al.*,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND PROPOSED BRIEF OF *AMICUS CURIAE* THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Proposed *amicus*, the Student Association of the State University of New York, Inc. (SASU) moves for leave to file the attached proposed brief, *amicus curiae* in support of plaintiff petitioners' petition for writ of certiorari.

The interest of proposed *amicus* in this matter derives from its longstanding advocacy on behalf of the rights of students at public institutions of higher education in New York State.

SASU has appeared twice previously as *amicus curiae* in this litigation, once before the Second Circuit Court of Appeals and also when this action was heard by this

Court during the 1988 term. *Fox v. Board of Trustees*, 492 U.S. 469 (1989). On both prior occasions, proposed *amicus* appeared by consent of all parties, a recognition of the important interest and stake proposed *amicus* has regarding the issues addressed by this litigation.

At this time, Mark S. Mishler, Esq., counsel to proposed *amicus*, asked Daniel Smirlock, Assistant Attorney General, State of New York, counsel of record for respondents herein, for consent to again appear as *amicus curiae* in regard to the petition for certiorari. In a telephone conversation on June 1, 1995, Mr. Smirlock expressly refused to consent to the submission by SASU of an *amicus* brief at this stage of the proceedings.

Proposed *amicus* submits that it has a unique perspective concerning the impact both of SUNY's unconstitutional regulation and the procedural details that have resulted in the possibility that the merits of this action will remain unaddressed. SASU, therefore, requests permission to file the attached proposed brief as a brief *amicus curiae* and asks that the brief be accepted by the Court.

Dated: June 2, 1995
Albany, New York

Respectfully submitted,

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PROPOSED BRIEF OF AMICUS CURIAE THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Student Association of the State University of New York, Inc. (SASU) endorses and supports the position of the student petitioners in the above-captioned matter. This proposed brief is presented to the Court along with the motion of proposed *amicus curiae* for permission to file a brief *amicus curiae*. Consent to file this brief was denied by counsel for respondents.

INTEREST OF THE AMICUS

The Student Association of the State University of New York, Inc. (SASU), was founded in 1970 and represents the interests of 390,000 students of the State University system.

The functions of SASU are to represent, advocate and further the interests and welfare of the students of the State University of New York. SASU does this by lobbying in the New York State Legislature and the Executive Branch on behalf of students, litigating issues of students' rights and developing programs for purposes which benefit students of the State University of New York SUNY.

SASU is committed to protecting and expanding the rights of college and university students. SASU has a particular interest in eliminating the remaining vestiges of *in loco parentis* policies in the State University system.

Of the 64 campuses in the New York State University system, approximately 25 campuses, including all of the largest colleges and universities, have state-owned dormitories. One or two campuses have privately owned dormitories.

THE UNDERLYING ISSUE

The underlying issue on which this Court heard argument, issued an opinion and remanded to the lower court six years ago in its Opinion and Order of June 29, 1989 concerned the constitutionality of Resolution 66-156 of the Board of Trustees of the State University of New York, as amended by Resolution 73-26 and 79-100. This

regulation, with certain exceptions not here relevant, denies "authorization . . . to private commercial enterprises to operate on the State University campuses".

The regulation, as interpreted and applied by SUNY at its individual campuses, prevented students from using their private rented dormitory rooms – as a place to receive – and enjoy the exercise of the first amendment rights, through the presence and speech of their invited guests, who were sellers of goods and offering professional services.

This total ban included sales demonstrations, by invited or others off campus, not only regarding commercial goods, but also visits from lawyers, doctors, private tutors, or any other professional people who "sought to make a profit" from the visit.

THIS COURT'S OPINION AND REMAND ORDER OF JUNE 29, 1989

This Court found SUNY's limitations on professional speech subject to all the protections of pure free speech and found for plaintiffs. It rejected SUNY's contention, as the party seeking Certiorari, that its right to limit speech should be judged by the "rational basis", public forum test; and remanded the *commercial speech* issue to be resolved under a revised constitutional standard.

The balance of the Statement of the Case and procedural history of what occurred after this Court's Opinion and remand order six years ago is fully and accurately stated in the Student Plaintiffs' Petition. It need not be restated here other than to point out how the

lower court, having granted plaintiffs' leave to amend to add new parties in response to defendant's belated motion to dismiss for mootness, that was filed after remand to the district court, reversed its order after waiting two years, and threw the case out on the grounds that there was no case or controversy. (For quick convenient reference to the principal procedural events and the extraordinary delays encountered in this case see the Student Plaintiffs' "Timeline" in the Appendix to its Petition, pp. 1a-2a).

This Association, believing that the issues raised in Plaintiff's original action involved important constitutional issues for college and university students, filed an Amicus Brief with this Court on December 28, 1988 supporting the plaintiffs, as respondents.

Now, the Association respectfully requests, for the reasons set forth in Plaintiffs' Petition, which it fully supports, and the additional reasons set forth below, that this Court will without further delay,[1] or after further briefs and argument direct that all issues in this case be finally decided at the earliest possible date consistent with principles of fairness and due process.

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[1] See fn. 16 at Petition, p. 30, where Petitioners invite this Court alternatively to consider *summary disposition* on two different legal grounds, with citations in that footnote to relevant portions of the Petition.

THE ISSUE PRESENTED FOR REVIEW

This Amicus Brief will not restate the issue for review, as presented in the Student Plaintiffs' Petition, which it adopts. Nor will it focus on that portion of their Statement and development of the important constitutional issues in its petition, as impacted by the mootness doctrine, bearing on basic "certworthy" issues. This appears in:

- their extensive analysis of the "mootness doctrine" conflicts in the cases, both *within the Circuits* and *among the Justices of this Court*, [see Petition pp. 7-22]: and

- the frequency with which this issue arises and why it should be decided now and put to rest. [see Petition pp. 14-16]

Rather, this brief focuses on two critical issues and concerns to student members of this Association, students in colleges and universities through the nation:

First, the unfairness in the way this case and these plaintiffs were treated by the lower courts, following remand by this Court, and those courts' response to the good faith efforts of representative leaders of student government to establish their rights under the U.S. Constitution; and

Second, to stress, if the procedural finding of mootness in this case is not reviewed and reversed by this Court, the serious and adverse impact it will have, not only on them, but on all students and private litigants in the future in their efforts to secure competent counsel.

This in turn will undermine, as discussed below, the clearly expressed intent of the Congress in adopting 42 U.S.C. §1988 to encourage enforcement of private rights guaranteed the people by Acts of the Congress and the Constitution by awarding legal fees to the plaintiffs, as prevailing parties.

I. THE UNFAIRNESS IN THE WAY THE STUDENT PLAINTIFFS HAVE BEEN TREATED BY THE LOWER COURTS SINCE THIS COURT'S REMAND ORDER SIX YEARS AGO

It would serve no purpose to burden this brief with a detailed discussion of the unfairness to the student plaintiffs, given the thoroughness of the Plaintiff's Petition. See Petition at page 7 and Section 3B., pp. 24-25 and pp. 28-29.

Suffice it to say that taking 13 years to resolve an important constitutional case, and then dismissing the case for mootness because all the original students have graduated or left, does not reflect well on the justice system. And equally understandable, is the poor impression of justice given to the plaintiff students and other students throughout the country in this, their first exposure to the federal system of civil justice.

Much of this poor impression can be ameliorated if this Court moves promptly to direct that all open issues be resolved as soon as practicable.

II. IMPORTANT LEGAL CONSIDERATIONS – THAT ADVERSELY IMPAIR CONGRESSIONAL INTENT TO ENCOURAGE PRIVATE LITIGATION TO ENFORCE CONSTITUTIONAL RIGHTS – ARE IMPACTED BY A NARROW AND STRICT APPLICATION OF THE MOOTNESS DOCTRINE

One of the major reasons for filing this Amicus Brief is to call to this Court's attention the genuine concern of students in public colleges and universities of the impact of the lower courts' decision if not reversed, on future efforts to secure competent counsel to represent them in important constitutional or civil rights actions.

As support for this concern, we call to the Court's attention certain perceptive extracts from a Comment entitled *Civil Rights Attorney's Fees Awards In Moot Cases* in the Summer, 1982 issue of the University of Chicago Law Review 49 U. Chi. L.Rev. 819.

Speaking to the difficulties encountered in securing counsel in "civil rights" cases, the writer states, at page 821:

> "Despite the premium most people place on their civil rights, there are two serious disincentives to bringing private suits to enforce those rights:
>
> • First, because civil rights remedies often are only equitable, a plaintiff must finance the litigation without hope of recovering a damage award out of which to pay a lawyer. Few people can afford this cost.
>
> • Second, even when the public would benefit greatly from a suit, there is little incentive for any one individual to undertake the lawsuit

> because he would be paying for benefits he could receive free if someone else brought the suit." (footnotes omitted)

The writer goes on to state, at pages 821-22, as noted below:

> "To overcome these disincentives, Congress included attorney's fees awards provisions in many of the modern civil rights statutes, and fees are commonly awarded in suits brought under those statutes. The possibility of recovering fees promotes private civil rights litigation and enforcement in four ways:
>
> • First, the prospect of payment attracts lawyers to impecunious plaintiffs;
>
> • Second, it encourages speedy resolution of rights violations. If a defendant has a losing case dragging out the litigation through legal gamesmanship it will only increase the cost he will have to bear in the end;
>
> • Third, fees awards deter rights violations by adding to the liability of violators who are caught;
>
> • Finally, by increasing the number of enforcement suits, fees awards raise the probability that any given violator will be found liable and be penalized. (footnotes omitted)

Plaintiffs' petition as noted below, documents the particular validity of item "second" of the above points, that comment on the situation of a defendant with a "losing case dragging out the litigation through legal gamesmanship".

See for example:

• Petition at Question Presented for Review, p. i; Reasons for Granting the Writ, pp. 7-8; and Section D. Judicial Considerations, pp. 27-28.

• See in particular fn. 15 where the transcript of oral argument in 1993 before the 2nd Cir. CA validates this very point. The Petition at pp. 28-29 states as follows:

> In fact, the record at oral argument on December 16, 1993, in this very case, before a panel of the Second Circuit Court of Appeals, on plaintiff's appeal from the District Court's finding of mootness, establishes this very point – SUNY's real motive, in pressing its mootness defense so vigorously, was to avoid the State's liability to plaintiffs for legal fees, extending over a twelve year period.

Fn. 15 reads as follows:

> During argument by SUNY's counsel, the electronic transcript of the record furnished by the Clerk's office for the Second Circuit Court of Appeals shows that Judge Winter perceptively identified one of the underlying issues in this case, when he stated to SUNY's counsel:
>
> "*By Judge Winter*: The real problem in this case is that the case has gone on for twelve years and if the mootness argument prevails, the state gets to hang onto legal fees that the plaintiffs would be entitled to in a losing first amendment case, and obviously we can see why this point is very heavily litigated.
>
> *By Mr. Smirlock*: You talk about a losing First Amendment case. So far not so, Your Honor. We are back in the District Court from

adjudication. Obviously legal fees are at issue here."

Almost at the very end of SUNY's counsel's argument, Judge Winter asked SUNY why the State was taking such a "rigid position" and in not modifying the Regulation at least as to pure free speech.

The colloquy below, and particularly SUNY's counsel's answer, further corroborates the concern regarding a rigid application of the mootness defense to a case such as this.

> *By Judge Winter*: I just have one other question. What is wrong with reforming the statute to exclude from its coverage people such as doctors, lawyers and others who might be invited on the campus to perform a service, particularly an emergency service, to allow it? Why is the state taking such a rigid position on the regulation?
>
> *By Mr. Smirlock*: I think partly because of the attorney's fees, Your Honor. I will be glad to submit the brief that we have put in the District Court on the merits. I think strategically we're taking the position on the same reason they're taking the position and just now starting over with new plaintiffs".

Respectfully, this is a highly inappropriate use of the "mootness defense" and should not be countenanced by any court.

III. CONCLUSION

For all the foregoing reasons, this Association filing this proposed Amicus Brief urges Your Honorable Court to grant the relief as asked for by Petitioners in their Conclusion or alternatively in fn. 16 at page 30.

Dated: June 2, 1995
Albany, New York

Respectfully submitted,

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(4)

No. 94-1819

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1995

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REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The SUNY Respondents apparently have concluded that they cannot effectively meet and rebut Petitioners' carefully constructed arguments and contentions, thoroughly supported in their Petition for Writ of Certiorari by citations to critical cases in this Court and the courts of appeals.

Thus, their strategy has been to ignore this Petition and present a host of new arguments, frequently unsupported by the cases cited, or without any case authority at all, and thereby seek to divert attention from the inherent weakness of their position.

Unfortunately, neither time nor space will permit a page by page documentation of such serious charges. However, we respectively submit that this will become apparent from the comments below, and a careful comparison of Respondents' Brief in Opposition to the positions developed in the Petition for Writ of Certiorari.

Essentially, Respondents make two fundamental points that, as this Reply Brief points out, are unsupportable and wrong:

- First, **by ignoring all of the material and a host of citations from** pp. 8 through 22 of the Petition for Writ of Certiorari, Respondents make the simplistic, unsupported argument at page 8 of their brief that **"the confusion and conflicts plaintiffs purport to detect . . . are simply nonexistent."**

- Second, that a condition of mootness is so **fundamentally jurisdictional, grounded as it is in Article III**, that it brooks no exceptions; -- and that when a case lacks viable plaintiffs, with a legal stake in the outcome, it is moot; and **no court, including this Court, has the jurisdictional power to take any action** (by way of amendment, adding new parties, or

otherwise) to infuse new life into an otherwise dead case to permit a final resolution on the merits.[1]

1. Respondents Erroneously Contend That There Is No Confusion Or Conflict In The Caselaw On The Application Of The Mootness Defense

A. *Respondents Fail to Address Caselaw Cited Throughout Petitioners' Brief that Illustrates the Conflict and Confusion on the Application of the Mootness Doctrine*

Respondents contend that there is no conflict or confusion regarding the application of the mootness doctrine, and that any disagreement that does exist is simply an academic debate among law professors. Respondents' contention, however, is simply unsupported by the extensive caselaw discussing the proper application of the mootness doctrine. This caselaw, from this Court as well as from the Circuit Courts below, illustrates that the debate concerning the proper application of the mootness doctrine is ongoing and far from resolved.

Respondents have disingenuously responded to only one side of the debate and seek to mislead this Court that no confusion exists:

- They have failed to respond to or distinguish Petitioners' arguments regarding the "prudential" nature of the mootness doctrine and the many cases cited by Petitioners that have recognized this flexible approach, such as *United States Parole Commission v. Geraghty*, 445 U.S. 388, 404-06 & n.11 (1980) and *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) and its progeny.

- They fail to address in depth *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring), particularly Mr. Chief Justice Rehnquist's discussion of the mootness doctrine in his concurring

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1 As developed below, Mr. Justice Scalia, writing for a unanimous court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389-90 (1994), perceptively addresses this very issue. There, this Court definitively and conclusively rejects SUNY's contention, holding that appellate courts have, and must have, power to take appropriate action, other than making a decision on the merits, with respect to a moot case.

opinion, which is discussed at pp. 11-13 of Petitioners' brief. Mr. Chief Justice Rehnquist stated that mootness "may be overridden where there are strong reasons to override it," and argued that in certain situations the mootness doctrine should be abandoned altogether or relaxed. *Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring).

- They instead focus only on student cases that became moot when the students graduated. The underlying issues discussed in Petitioners' brief, however, transcend student cases.

- They have chosen to ignore the issues addressed by Petitioners at pp. 16-22 of their brief regarding the conflict among the Justices of this Court and the Circuit Courts as to the competing views of the application of mootness doctrine; -- and have chosen to address only one of these approaches, ignoring caselaw from this Court and the Circuit Courts below that recognize and discuss these alternative approaches.

- They totally ignore two very important decisions from the Second and Sixth Circuits that recently have questioned the appropriate application of the mootness doctrine. *See:*

  - *Heldman v. Sobol*, 962 F.2d 148, 154 n.7 (2d Cir. 1992) (noting that members of this Court and commentators have questioned nexus between mootness doctrine and Article III);[2] and

  - *Kellogg v. Shoemaker*, 46 F.3d 503, 507 (6th Cir. 1995) (summarizing Article III-based and prudential-based views of mootness doctrine), *petition for cert. filed*, No. 94-9509 (May 30, 1995).

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2 *But see Christopher P. v. Marcus*, 915 F.2d 794, 803-04 (2d Cir. 1990) (which reached opposite conclusion from *Heldman* in similar factual scenario involving mootness of claims brought by handicapped children no longer enrolled in defendant school), *cert. denied*, 498 U.S. 1123 (1991).

B. *Caselaw Cited by Respondents Has Not, As Respondents Contend, Resolved the Conflict and Confusion in the Courts*

Rather than address Mr. Chief Justice Rehnquist's arguments in *Honig*, Respondents contend at pp. 9-10 of their brief that two opinions of this Court subsequent to *Honig* have cleared up any confusion concerning the doctrine's application. *See*:

- *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); and
- *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994).

Most emphatically these two opinions do not resolve the confusion in this Court or in the Circuit Courts regarding the mootness doctrine. Furthermore, both cases recognize as Petitioners contend the Court's power to take appropriate action in a moot case:

- First, neither case discusses *Honig* or even cites to this opinion.
- Second, neither case addresses the mootness debate and the differing approaches to its application.
- Third, in both cases, the Court affirmed its power to act once it had determined that Article III's requirements were no longer met.

In *Lewis*, the Court vacated the judgment of the appellate court and remanded the case to permit the parties to amend the pleadings or further develop the record. *Lewis*, 494 U.S. at 482.

In *Bancorp*, the issue before the Court was whether the Court had the power to entertain a motion to vacate a judgment after a settlement between the parties that rendered the case moot. *Bancorp*, 115 S. Ct. at 389. The Court's passing references to Article III were made, not in the context of a discussion of the mootness doctrine, but as dicta to discuss the Court's powers *after* a determination of mootness had been reached.

Mr. Justice Scalia, writing for a unanimous Court in *Bancorp*, stated that

> reason and authority refute the quite different notion that a federal appellate court may not take any action with regard to a piece of

litigation once it has been determined that the requirements of Article III no longer are . . . met.

Bancorp, 115 S. Ct. at 389.

Mr. Justice Scalia noted that "Article III does not prescribe such paralysis," for "'[i]f a judgment has become moot [while awaiting review], this Court may not consider its merits, **but may make such disposition of the whole case as justice may require.**'" *Id.* at 390 (quoting *Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944) (emphasis supplied)).

Despite Respondents' claims to the contrary, recent appellate court decisions demonstrate the **persistent confusion** regarding the appropriate application of the mootness doctrine:

- In *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1822 (1995), discussed in Petitioners' brief at p. 18, the Sixth Circuit refused to dismiss an action in response to claims of mootness. Petitioners' case is indistinguishable from the facts in *Washegesic*, in that Petitioners, could return as visitors just like the student in *Washegesic*, at which point Petitioners would be subjected to the same unconstitutional regulation that they originally challenged at the outset of this litigation.

- In *Kellogg v. Shoemaker*, 46 F.3d 503 (6th Cir. 1995), *petition for cert. filed*, No. 94-9509 (May 30, 1995), discussed in Petitioners' brief at p. 9, the Sixth Circuit at the outset noted the confusion and controversy surrounding the mootness doctrine and refused to render plaintiffs' claims moot.

C. *Respondents Fail to Address Caselaw Cited in Petitioners' Brief that Illustrates the Flexibility Inherent in the Mootness Doctrine When "Significant Constitutional Issues Are at Stake"*

Incredibly, Respondents' brief ignores and fails to even discuss *United States Parole Commission v. Geraghty*, where this Court stated that the mootness doctrine is flexible and "riddled with exceptions." 445 U.S. 388, 404-06 & n.11 (1980). As discussed at pp. 13-16 of Petitioners' brief, in

creating each exception to the mootness doctrine, the Court "has looked to practicalities and prudential considerations." *Id.*

Similarly, and surprisingly, Respondents make absolutely no effort to distinguish the caselaw cited on pp. 13-16 of Petitioners' brief to support the position that this Court has adopted a flexible approach to the mootness doctrine when **"significant constitutional issues are at stake."**

2. Respondents Are Wrong In Contending That Mootness Destroys Petitioners' Right To Amend; And That Being Jurisdictional It Brooks No Exceptions

SUNY throughout its brief (*see* pp. 10-11, 17-19, citing *Bancorp* at p. 18, and at pp. 20-21, citing *Princeton University v. Schmid* at p. 21) contends in effect that a moot case is a dead case that cannot be revived by substituting new parties.

As noted in Section 1 above, Respondents' reliance on *Lewis* and *Bancorp* for this proposition is disingenuous because these cases make it absolutely clear that even in a case designated by the Supreme Court as "moot," the Court still has the power to take appropriate action, which it did in both cases, to correct the mootness in order to permit a resolution of the issues on the merits.

Surprisingly, in making the argument that a court is powerless to permit amendment of a moot case, Respondents fail to cite to, distinguish or otherwise rebut Petitioners' position at p. 27 of their brief in which Petitioners rely heavily on this Court's decisions in *Mullaney v. Anderson*, 342 U.S. 415 (1952) and *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990).

In *Mullaney*, this Court permitted an amendment similar to that which Petitioners seek here: i.e., to remedy the mootness issue and permit substitution of new plaintiffs (union members) for a plaintiff (the union) that did not have standing to sue. Thus, prior to the substitution of the new parties in *Mullaney*, there was no legally viable plaintiff before the Court. Nevertheless, the Court permitted an amendment of parties to reinstate the Court's power to resolve the merits. This Court's reasoning, which is cited in Petitioners' brief at p. 27 and restated here, was that

> to dismiss the present petition and require new plaintiffs to start over in the district court would entail needless waste and run counter to effective judicial administration.

Mullaney, 342 U.S. at 417.

Additionally, Respondents fail to discuss a leading decision by this Court that follows *Mullaney*. In *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836-37 (1989), this Court ruled squarely against Respondents' position that a moot case is a dead case that cannot be revived, holding that Rule 21 of the Federal Rules of Civil Procedure gave the Court the inherent power to deal with issues involving the joinder of new parties, even if the joinder was designed to correct jurisdictional defects.

The Court explained that it would not disturb that "deeply rooted understanding" of a court's power, "particularly when requiring dismissal after years of litigation would impose **unnecessary and wasteful burdens on the parties, judges and other litigants waiting for judicial attention**." *Id.* at 836. (emphasis added) Moreover, the Court aptly noted Judge Posner's eloquent statements in the lower court in *Newman-Green*

- that "law is an instrument of governance rather than a hymn to intellectual beauty" and
- that plaintiff "should not be compelled to jump through [such] judicial hoops merely for the sake of **hypertechnical jurisdictional purity**."

Id. at 837 (emphasis added) (quoting *Newman-Green v. Alfonzo-Larrain*, 854 F.2d 916, 925 (7th Cir. 1988) (Posner, J.)).

Furthermore, Respondents' reference on p. 21 of their brief to this Court's decision in *Princeton University v. Schmid* is inexcusable and outrageous advocacy, suggesting that this case supports the inability of federal courts to permit amendment of a moot case. This case most emphatically

does not so hold. In *Princeton*, this Court held simply that the case was moot because the regulation at issue had been substantially amended.[3]

In the instant case, and unlike the *Princeton* case and several others cited in Respondents' brief, the issues, as developed in Section 3 below, are still very much alive. These issues continue to impact all students at all of the 32 residential SUNY campuses in the statewide university system.

3. This Case Is Not, As Contended By Respondents, Solely About Attorneys' Fees. Rather, It Is A Genuine Representative Action To Correct An Egregious Wrong By Respondents That Continues To This Day To Violate The Fundamental Constitutional Rights Of All Students Enrolled At All Of The 32 Residential Universities Or Colleges In The Statewide SUNY System

Respondents' contention at pp. 22-23 of their brief, without any record support, that the sole reason for Petitioners to continue this case is because of their **counsels' "quest" for attorneys' fees** is absolutely untrue.

The only time the counsel fee issue has ever surfaced in this case was at Oral Argument in the Second Circuit on December 16, 1993. Respondents' counsel was perceptively questioned by Judge John M. Walker,

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3 *Princeton University v. Schmid*, 455 U.S. 100 (1982), involved a certiorari petition to this Court by Princeton University (as a private intervenor in a criminal indictment for trespass against a defendant handing out political handbills). Princeton's interest in seeking certiorari was to protect its right to keep trespassers off its campus.

After the incident, which prompted the arrest and conviction of the defendant, the University **substantially changed its regulations.** In declining to accept jurisdiction, this Court, in a per curiam opinion, stated, in commenting on the substantially amended regulations governing solicitation, that

> the issue of the validity of the old regulation is moot, for this case has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law."

Id. at 103 (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)).

Jr.[4] as to why (as pointed out on p. 28, fn. 15 of Petitioners' brief) Respondents had taken such a "rigid position" in not modifying that part of its unconstitutional regulation, still in effect, that this Court ruled six years ago clearly violated the students' pure free speech rights regarding their contacts with doctors, lawyers, tutors, etc.[5]

SUNY's counsel, in response to the Court's questioning, all but conceded that their real motivation in not amending their offensive regulation -- and in seeking to block Petitioners' efforts to amend and correct the mootness issue -- was to avoid the state's liability to Petitioners for counsel fees. (*See* Petition for Writ of Certiorari, p. 28, fn. 15).

The Students' Strong Desire To Have These Issues
Finally Resolved On The Merits

As far as the students are concerned, the fact of the matter is that counsel's efforts in the last six years since this Court's decision have been assiduously, conscientiously and solely focused on representing their clients to obtain the relief that prompted Petitioners to bring this action in the first instance (and later joined by a number of additional representative students) to vindicate:

- their first amendment rights in their unrestricted right to the use of their dormitory rooms; and

- their rights as visitors to go to other dormitory rooms on campus to enjoy their first amendment rights.

As is clear from the Affidavits in Support of the June 22, 1991 Amended Complaint (J.A. 454-67) filed by the seven students, as officers or as holding key positions in student government at their respective campuses, their joining this action was to insure that they and **"other students in the same**

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4 Opposing counsel at p. 23, fn. 6 of their brief is quite correct that it was Judge John M. Walker, Jr., and not Judge Ralph K. Winter, who sat on the panel and questioned SUNY's counsel. We wish to correct this error and apologize for our mistake.

5 *Fox v. SUNY*, 492 U.S. 469, 480-85 (1989), Opinion for the Court by Mr. Justice Scalia.

situation" would have the full enjoyment of their same first amendment speech rights.[6]

Finally, as an indication of the **continuing interest** of the Petitioners to have their constitutional rights vindicated, see the Affidavits of James B. Cullen of November 1, 1993 and the Affidavits of four additional intervenors filed as part of Petitioners' 1993 Motion to Supplement the Record before the court below.[7]

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6 See, for example, the Affidavit signed by William F. Weitz, a student at the University of Albany campus, who as of June 1991, was serving as the elected president of the Student Government at the Albany campus. There, he stated as follows:

> 5. I desire to have the right, without interference or censorship by defendants to invite a business invitee of my choosing to my dormitory room, or alternatively, to host and/or attend in the privacy of my own or another student's dormitory room, a meeting to discuss with a business invitee such topics as the students, in the exercise of their own free choice decide to participate in. Without limitation to the foregoing, I desire to have the right to hear and/or attend a meeting with a job counselor, doctor, lawyer, tutor, stockbroker and/or a representative of American Future Systems, Inc.
>
> 6. It is my belief that the policies of my school violate my constitutional rights and I want to become a plaintiff in this case to insure that **I and other students in the same situation** will have the full enjoyment of our same First Amendment speech rights.

See J.A. 472-74 (emphasis supplied).

7 On November 3, 1993, counsel for the Student/Plaintiffs filed a Motion with the Clerk of the Second Circuit Court of Appeals to Supplement the Record. This Motion contained, *inter alia,* all of the affidavits above referred to. The Motion to Supplement the Record was granted subject to reconsideration by the panel as a matter of administrative convenience.

While the Court in its Opinion (*see* Petition for Certiorari at 21a - 22a decided to change its position on the Motion, it did however consider the affidavits on their merits and ruled "in any event, consideration of the affidavits would not affect the outcome of this case. They merely show that several of the plaintiffs have expressed an intention to return to the SUNY system."

(continued...)

- James B. Cullen indicated that he definitely plans to go back to a SUNY campus to complete his missing credits for graduation; and when he does, he wants to be sure that he could "as an invitee of another student, freely exercise my free speech constitutional rights within the privacy of another student's room on campus to which I am invited."

- In the same Affidavit, he stated that he wanted "very much to see that the important issues we raised in this case are finally resolved, and in our favor, to vindicate the positions which I and my fellow students took in bringing this action in the first instance."

- The remaining other four Student Plaintiffs (after reaffirming their same interests to have the case that they started resolved, and to insure their rights on campus as future visitors) express **their continuing interest** to have this case resolved on its merits because as alumni, they have a "continuing pride and interest in helping to uphold and enhance the reputation of 'our university' to be known and respected as one that encourages and protects free discussion."[8]

7(...continued)

Here, these affidavits are offered:

- to show the continuing interest of the Student/Plaintiffs;

- to effectively rebut SUNY's contention that the sole reason for this case continuing on is because of the lawyers' quest for fees; and

- to demonstrate, as pointed out above, that the students had brought this case in both an individual and a representative capacity.

8 Paragraph Third of the students' affidavit reads in its entirety as follows:

> As graduates and members of the alumni of the various campuses of SUNY which we have attended, we have a continuing pride and interest in helping to uphold and enhance the reputation of "our university" to be known and respected as one that encourages and protects free discussion, and particularly the rights of its students and their invitees to listen to and participate in constitutionally protected free or commercial speech.

Representative Action
(see also Petition for Writ of Certiorari, p. 25-26)

Respondents' brief at pp. 14-17 disparages Petitioners' contention, as was permitted in *Brandon v. Board of Education*, 635 F.2d 971 (2d. Cir. 1980), *cert denied*, 454 US 1123 (1981), discussed in the Petition at p. 22, that this action was brought as a representative action, albeit it was not certified as such, for reasons stated in the Petition at p. 26 and fn.12.

Respondents' brief then quotes out of context at p. 15, fn. 5 certain phrases by some of the Petitioners to document Respondents' contention that the Petitioners were suing solely on their own behalf.

Any doubt as to the fact that these students were suing both for themselves and **others similarly situated** is unequivocally established by the references above to the Petitioners' affidavits of 1991 and 1993 and footnotes 6, 7 and 8 above.

Furthermore, Respondents' brief, not surprisingly, conveniently ignores and fails to quote from other extensive testimony that was presented, without any objection by Respondents, to establish that the Petitioners were elected student government representatives who viewed the case as a student's rights case and became involved because it was significant to the students they represented. (J.A. 261-64).

For example, Petitioner Philip Botwinik testified that "he was very active in the student government at [SUNY] Albany and became involved in the case after he was approached by the then president-elect of the student government, Stephen Gawley, another plaintiff in the case. Botwinik stated that he became involved in the case because he believed that

> the rights, the constitutional rights of students should be upheld. And this case I believe depicts an issue that is of grave importance to many students living in the dorms and outside the dorms. (J.A. 264)

Finally, Respondents at p. 11 cite *Cook v. Colgate University*, 992 F.2d 17 (2d Cir. 1993) as part of a string cite for the proposition that "graduation of plaintiffs 'before the district court's order can affect them,' rendered case moot." What Respondents fail to point out, however, is that

- Plaintiffs, in that case and **unlike this case, were asserting individual damage claims**; and were not suing in a representative capacity; and

- there was no argument or showing, as here, that the plaintiffs might return to Colgate.

Circuit Judge McLaughlin went on to point out that the case would not be moot if, as here, the plaintiffs had sued in a representative capacity. *Id.* at 20.

4. Examples Of Other Instances Where SUNY Totally Ignores Compelling Arguments Why This Court Should Grant:

¶ Certiorari; Or Alternatively,

¶ Summary Disposition As Noted In Student/Plaintiffs' Petition for Writ of Certiorari

As noted at the outset of this Brief, neither time nor space permits a page by page documentation of all the points and cases developed in the Petition that the SUNY Brief totally ignores and fails to discuss.

Most of them have already been pointed out above. However, several additional ones that SUNY ignores should at least be noted, such as:

- This Court's resources should not be wasted once this Court accepts jurisdiction. *See* Petition for Writ of Certiorari, pp. 23-24.

- The three Judicial Considerations detailed on p 27 of the Petition include:

  - Squandering judicial resources

  - Needless expense of class action -- including the arguments advanced on p. 26 and in fn. 12 of the Petition as to why a class of plaintiffs not seeking individual damages should be able to litigate a representative action, without resort to the cumbersome and expensive procedural device of class action certification.

- Undermining public confidence in the will and ability of the judicial system to act fairly, decisively and without undue delay.

- The discussion in the Petition at p. 27 and fn. 13 concerning the important public policy considerations underlying Fed. R. Civ. P. 15(a) and 21.

And last, but by no means least, is the failure of SUNY to respond to the suggestion in the Petition at p. 30, fn. 16 regarding **two alternatives for Summary Disposition by this Court.** Clearly, this Court has the power to so act.

Considering the extraordinary delays in the thirteen year history of this case, such action would fulfill the goals set by this Court to avoid needless waste of judicial resources and expense and delay to the parties, as articulated in:

- *Mullaney v. Anderson* (see Petition p. 27 and this Brief above at pp. 6-7);

- *Newman-Green, Inc. v. Alfonzo-Larrain* (see this Brief above at p. 7); and

- Mr. Chief Justice Rehnquist's concurrence in *Honig v. Doe* cautioning against "squandering the unique resources of time spent by this Court on briefs, oral argument and conferencing." *See* Petition, p. 23-24.

CONCLUSION

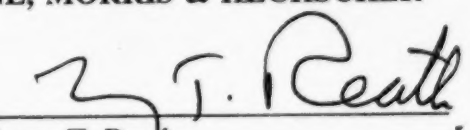
For the foregoing reasons, Petitioners respectfully pray that this Court:

- Issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, or alternatively

- Order summary disposition of this matter and direct the Court below to remand with leave to the Petitioners to amend their Complaint to join new Student/Plaintiffs under Fed. R. Civ. P. 15(a) and 21; and forthwith resolve the open issues in accordance with this Court's remand order in its opinion in this case.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By: 

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No. 94-1819

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Petitioners,

against

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC.

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No. 94-1819

IN THE

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October Term, 1994

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RESPONDENTS' BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC.

Statement of the Case

The facts of the case are discussed in the Brief of Respondents in Opposition to Petition for a Writ of Certiorari at pages 2 through 8. The present movant, The Student Association of the State University of New York, Inc. ("SASU"), is an organization purporting to represent "the interests of 390,000 students of the State University [of New York] system." On June 1, 1995, counsel for respondents declined to consent to SASU's filing of a brief *amicus curiae* in support of the petition for a writ of certiorari.

Reasons for Denying the Motion

As fully demonstrated by the arguments in respondents' brief in opposition to the petition for certiorari, this case long ago passed the point at which it was of interest to current SUNY students, or indeed to anyone but plaintiffs' attorneys. The departure of plaintiffs, former SUNY students, from the SUNY system left them with no stake in the outcome of the litigation and, as the two courts below recognized, renders the case moot.

Thus, SASU's efforts to premise its interest in the case on "the underlying issue[s]" (*Amicus* Brief, p 2) are wrongheaded, for those issues are no longer before this Court. The only issue on which the petition for certiorari is based is the entitlement of plaintiffs to continue a case in which they no longer have an active interest. SASU can demonstrate no particular immediate concern with the present case on behalf of SUNY students.

SASU's sole argument supporting its motion (*Amicus* Brief, p 7) is the claim that the decision below will adversely affect the "future efforts" of "students in public colleges and universities" to "secure competent counsel." This argument, which does nothing more than echo that made by plaintiffs on the present petition, is fully addressed by respondents in their brief (pp 22-23). To summarize this argument: This case has nothing to do with the recoverability of attorney's fees under 42 USC § 1988 in civil rights actions brought by students pursuant to 42 USC § 1983. The mechanism of a class action is available to avoid the foreseeable mootness of such cases when plaintiffs graduate from or otherwise depart the defendant institutions. The simple procedural expedient of amendment of the complaint pursuant to Fed R Civ P 15 to add new student plaintiffs while the controversy remains live is likewise available, and indeed was once employed by counsel for plaintiffs in the present litigation. Whether plaintiffs' failure to take the steps necessary to guarantee a continuing live controversy is attributable to strategy or oversight, this failure hardly imperils the entitlement to attorney's fees in a correctly-conducted litigation. Thus, the interest of *amicus* in the continued availability of attorney's fees is not implicated by this case.

Indeed, the absence of any genuine interest of *amicus* in this case in its present posture is conclusively demonstrated by the fact that any of the 390,000 students supposedly represented by SASU could commence today an action substantively identical to the present case and, by employing the simple and universally-recognized procedural expedients discussed above, be assured of recovering attorney's fees in the event of prevailing on the merits. The fact that, in the present action, a small group of former SUNY students permitted their case to become moot, has no bearing on the rights either of current SUNY students to commence civil rights actions against SUNY or of

their attorneys to recover counsel fees in appropriate cases. Accordingly, SASU has no interest justifying a grant of *amicus curiae* status in the case at bar.

CONCLUSION

The motion for leave to file a brief *amicus curiae* should be denied.

Dated: Albany, New York
June 12, 1995

Respectfully submitted,

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